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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 307

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, APPELLANT,

vs.

PHŒNIX INDEMNITY CO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED AUGUST 7, 1929

(34,438)

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[fol. 1]

IN SUPREME COURT OF NEW YORK, COUNTY OF RICHMOND

PHŒNIX INDEMNITY CO., Plaintiff,

against

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, Defendant

Controversy Submitted under Sections 546 to 548 of the Civil Practice Act

Plaintiff and defendant above named, being parties to a certain controversy between them, do hereby agree upon the following as a statement of the facts out of which their controversy arises, and do hereby submit said controversy to this court for decision and for judgment in favor of plaintiff or defendant, as this court shall determine.

AGREED STATEMENT OF FACTS—Filed April 2, 1928

1. At all times hereinafter mentioned plaintiff was and still is a domestic insurance corporation.

2. At all times hereinafter mentioned defendant was and still is a domestic railroad corporation with an office for the transaction of its business in the County of Richmond, State of New York.

3. On and prior to February 24, 1927, one Joseph Per-
[fol. 2] roth was in the employ of one Ove Anderson, doing business under the name and style of Economy Meat Market.

4. Said Ove Anderson, in compliance with the provisions of the New York Workmen's Compensation Law, had insured himself with plaintiff against liability for compensation for any injury to any of his employees, including said Perroth.

5. On February 24, 1927, and while acting within the scope of his employment by said Anderson, said Perroth

was struck by a train owned and operated by defendant, receiving bodily injuries which caused his death.

6. Said Perroth was struck and injured as aforesaid solely by reason of the negligence of defendant without any negligence of his contributing thereto.

7. Said Perroth left him surviving a dependent, to-wit, his widow.

8. Thereafter, but prior to the institution of this action, the Administratrix of the estate of said Perroth brought suit against defendant herein to recover monetary damages for the death of said Perroth.

9. Said suit was settled and discontinued before trial by the defendant therein, which is the defendant herein, paying to said Administratrix the sum of $15,000, receiving a general release therefor. Said sum of $15,000 is in excess [fol. 3] of the amount which said dependent of said Perroth would have been entitled to by way of compensation if claim had been made by her, pursuant to the New York Workmen's Compensation Law.

10. Thereafter, but prior to the institution of this action, and pursuant to subsections 8 and 9 of Section 15 of the New York Workmen's Compensation Law, two $500 awards were made in favor of the Treasurer of the State of New York and jointly against said Ove Anderson and plaintiff herein. Upon the date of said Perroth's death as aforesaid, subsections 8 and 9 of Sections 15 of said Workmen's Compensation Law provided as follows:

"§15. Schedule in Case of Disability.—The following schedule of compensation is hereby established:

* * * * * * *

"8. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed

period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: [fol. 4] The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund, and the commissioner shall direct the distribution thereof.

"9. Expenses for Rehabilitating Injured Employees.—An employee, who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the state department of education is being rendered fit, to engage in a remunerative occupation, shall receive additional compensation necessary for his rehabilitation, not more than ten dollars per week of which shall be expended for maintenance. Such expense and such of the administrative expenses of the state department of education as are properly assignable to the expense of rehabilitating employees entitled to compensation as a result of injuries under this chapter, shall be paid out of a special fund created in the following manner: The employer, or if insured, his insurance carrier, shall pay into the vocational rehabilitation fund for every case of injury causing death, in which there are no persons entitled to compensation, the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund.

"Disbursements from the vocational rehabilitation fund for the additional compensation provided for by this section shall be paid by the state treasurer upon vouchers signed by the industrial commissioner or deputy industrial commissioner.

"Disbursements from the vocational rehabilitation fund for administrative expenses of the state department of education shall be paid by the state treasurer upon vouchers signed by the commissioner of education or the deputy commissioner of education.

"Prior to the first days of January, April, July and Oc-
[fol. 5] tober there shall be submitted to the state board of estimate and control by the commissioner of education for its approval an estimated budget of administrative expenses of the state department of education which it is proposed to charge to the vocational rehabilitation fund for the succeeding three months. There may not be expended from the said fund for such administrative expenses, more than the amounts specified in such budget for each item of expenditure, except as authorized by the board of estimate and control."

11. Said awards were paid by plaintiff to the said State Treasurer on December 27, 1927.

12. No part of the amount of said awards has been repaid plaintiff by defendant or anyone on its behalf although proper demand has been made therefor.

13. At all times mentioned herein, Section 29 of the New York Workmen's Compensation Law provided, and still provides, among other things, as follows:

"* * * In case of the payment of an award to the state treasurer in accordance with subdvisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased."

The questions submitted to this Court for decision are:

I. Under the above facts, was the State Treasurer entitled to the awards made in his favor and paid by plaintiff, as stated in Paragraphs 10 and 11, supra?

II. If the first question is answered in the affirmative, [fol. 6] is plaintiff entitled to recover the amount of said awards from defendant by reason of §29 of the New York Workmen's Compensation Law?

If both questions are answered in the affirmative, then judgment is to be rendered in favor of plaintiff and against

defendant for $1,000 with interest from December 27, 1927, with costs.

If either question is answered in the negative, then judgment is to be rendered in favor of defendant and against plaintiff, dismissing this submission of controversy, with costs.

Phœnix Indemnity Co., by Vernon B. Chittenden, Plaintiff. (Seal.) The Staten Island Rapid Transit Railway Co., by Robert B. Luckey, Defendant. (Seal.)

[fols. 7 & 8] *Duly sworn to by Vernon B. Chittenden and Robert B. Luckey. Jurat omitted in printing.*

[fol. 9] [Title omitted]

Vernon B. Chittenden, being duly sworn, deposes and says that he is the vice-president of Phœnix Indemnity Co., the corporation plaintiff in the above-entitled action; that he is familiar with the subject matter of the within controversy and that said controversy is real and the submission thereof upon an Agreed Statement of Facts is made in good faith and for the purpose of determining the rights of the parties.

Vernon B. Chittenden.

Sworn to before me this 30th day of March, 1928. Edna M. Gordon, Commissioner of Deeds, City of New York. New York County Clerk's No. 78. New York City. Register's No. 39-0. Kings County Clerk's No. 129. Kings County Register's No. 129. Com. expires Mar. 1, 1930.

[File endorsement omitted.]

Certificate to foregoing paper omitted in printing.

[fols. 10 & 11] Reporter's certificate to opinion omitted in printing.

Judge's certificate to reporter omitted in printing.

[fol. 12] IN COURT OF APPEALS OF NEW YORK

PHŒNIX INDEMNITY CO., Respondent,

v.

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, Appellant

(Decided May 28, 1929)

Appeal by the Defendant from a Judgment of the Appellate Division, in the Second Judicial Department, in Favor of the Plaintiff Upon a Submitted Controversy.

Frederick H. Wood for appellant.

Jeremiah F. Connor for respondent.

OPINION—Filed Aug. 6, 1929

HUBBS, J.

In 1927 Joseph Perroth was an employee of one Anderson, who had insured himself with the plaintiff insurance company against liability in compliance with the provisions of the Workmen's Compensation Laws (Cons. Laws, ch. 67, as amended). Perroth, while acting within the scope of his employment, was killed through the negligence of the defendant, without any negligence on his part. He left him surviving a dependent, his widow. The administratrix of Perroth commenced an action against the defendant to recover damages because of the negligence of the defendant in causing Perroth's death. That action was settled by the defendant paying to the administratrix the sum of fifteen thousand dollars and receiving a general release. The amount paid by the defendant was in excess of the amount [fol. 13] which said dependent widow, Perroth, would have been entitled to receive as compensation under the provisions of the Workmen's Compensation Law.

Thereafter, and prior to the commencement of this action, two awards of five hundred dollars each were made in favor of the State Treasurer against Anderson and the plaintiff, his insurer, jointly, under subdivisions 8 and 9 of section 15 of the Workmen's Compensation Law. The awards were paid to the State Treasurer by the insurer, the plaintiff herein.

This action is brought pursuant to section 29 of the Workmen's Compensation Law, as amended by chapter 615 of the Laws of 1922, to recover from the defendant the sum so paid by the plaintiff to the State Treasurer. In an agreed statement of facts two questions were submitted to the Appellate Division for decision:

First. Was the State Treasurer entitled to the awards made in his favor and paid by the plaintiff?

Second. If the first question is answered in the affirmative, is the plaintiff entitled to recover the amount of said awards from the defendant by reason of section 29 of the Workmen's Compensation Law?

The Appellate Division answered both questions in the affirmative and judgment was entered in favor of the plaintiff.

At the time of said employee's death, the sections of the Workmen's Compensation Law in question read as follows:

[fol. 14] "§ 15. Schedule in case of disability. The following schedule of compensation is hereby established: * * *

"8. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund, and the commissioner shall direct the distribution thereof."

9. (Provides for the expense of rehabilitating injured employees and requires the insurance carrier to pay to the

State Treasurer the sum of five hundred dollars under the same terms as contained in subdivision 8 above.)

"§ 29. Subrogation to remedies of employees. * * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fif- [fol. 15] teen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased."

The contention of the appellant that the deceased left a dependent widow surviving him who would have been entitled to compensation under the statute if she had so elected and that, therefore, no awards should have been made to the State Treasurer under subdivisions 8 and 9 of section 15 has been conclusively decided by this court contrary to the contention of the appellant. (Matter of State Treasurer v. West Side Trucking Co., 233 N. Y. 202; Matter of State Treasurer v. Niagara Falls Power Co., 241 N. Y. 521; Matter of Chrystal v. United States Trucking Corp., 250 N. Y. 566.)

It is urged by the appellant that the Legislature did not have the power to create, by the amendment of section 29 in 1922, a cause of action against a third person through whose negligence an employee covered by the Workmen's Compensation Law met his death, because said amendment is in contravention of the due process clause of the State and Federal Constitutions and also denies to the appellant the equal protection of the law.

The reasons for the enactment of the Workmen's Compensation Law and the humanitarian purpose which it was enacted to further have been stated by this court and the United States Supreme Court. It has been treated as an enlightened forward movement, based upon social experi- [fol. 16] ence, enacted to do away with the harsh and often unjust rule of the common law that there could be no liability for injury without fault and to substitute in its place the more just and equitable rule making injuries received by employees without fault on the part of the employer a liability of the industry and adding the expenses, which are

first sustained by the employer, to the cost of production to be ultimately borne by the public at large. (New York Central R. R. Co. v. White, 243 U. S. 188; Matter of Jensen v. Southern Pacific Co., 215 N. Y. 514. Those cases established that the Workmen's Compensation Law is constitutional.

At the time they were decided the amendment of 1922 to section 29, which provides for an action by the employer or insurance carrier against one who has negligently caused the death of an employee to recover the sums paid to the State Treasurer, had not been enacted.

The constitutionality of subdivisions 8 and 9 of section 15 was passed upon in an action by the State Treasurer against the employer and the carrier in State Treasurer v. Sheehan Co. (236 N. Y. 579; affd., sub nom. Sheehan Co. v. Shuler, 265 U. S. 371) and in New York State Railways v. Shuler (265 U. S. 379) before the amendment of 1922 to section 29, in question here.

In those cases it was urged, as it is in this, that subdivisions 8 and 9 of section 15, or the provisions of the statute to like effect in existence at the time of the decisions in those cases, were in conflict with the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. In the case of Sheehan Company v. Shuler (supra) the United States Supreme Court, re- [fol. 17] ferring to subdivisions 8 and 9 of section 15, said:

"The substance of these two provisions is that when an injury causes the death of an employee leaving no beneficiaries, the employer or other insurance carrier shall pay the state treasurer the sum of $500 for each of two special funds: one to be used in paying additional compensation to employees incurring permanent total disability after permanent partial disabilities; and the other, in the vocational education of employees so injured as to need rehabilitation. The use of such special funds for such purposes is an additional compensation to the employees thus injured, over and above that prescribed as the payments to be made by their immediate employers. Such additional compensation is neither unjust nor unreasonable. Thus, an employee, who, having lost one hand in a previous accident,

thereafter loses the second hand, is, obviously, not adequately compensated by the provision requiring his employer to make payment for the loss of the second hand, independently considered; the total incapacity finally resulting from the loss of both hands working much more than double the injury resulting from the loss of each separate hand, considered by itself. In such a case, however, as in the case of an injury requiring vocational rehabilitation, it is the theory of the law that such additional compensation to the injured employee should not be required of the particular employer in whose service the injury occurred, but should be provided out of general funds created by payments required of all employers when injuries resulting in the death of their own employees leaving no beneficiaries, do not otherwise create any liability under the Compensation Law."

[fol. 18] The Legislature, in carrying out the benevolent purpose of the statute, by its amendment adding subdivisions 8 and 9 of section 15, furnished additional protection to the class of employees specified therein engaged in hazardous occupations and provided that the fund for furnishing such additional protection should be contributed by employers coming under the act, or their insurance carriers, in cases where they were not liable to pay directly to dependent survivors of the deceased employees. The same principles which inspired the enactment of the Workmen's Compensation Law, and have animated the courts in construing it, were cogent reasons for holding the amendments embodied in subdivisions 8 and 9 of section 15 to be constitutional.

The State has adopted a policy which provides that the unfortunate employees who have suffered the injuries described are entitled to the compensation provided, in order that they may become rehabilitated and not become dependent, or wards of the State. In the first instance, the burden of furnishing funds to carry out the purposes of the statutes was placed upon the employers engaged in hazardous occupations, without regard to fault on their part or whether the fund contributed by a particular employer was to be used for the benefit of employees injured in his business.

Thereafter, the Legislature, in 1922, amended section 29, to provide, in substance, that where an employer or his insurance carrier has been obliged to contribute to such funds, he may recover from the wrongdoer who, by his wrongful act, has made such contribution necessary, the amount so contributed. It is an attempt to remove the burden from one who has not committed a wrong and to [fol. 19] place it upon one who, by his wrongful act, has made the payment into the funds necessary.

If it be conceded that the State, in establishing the funds for the benefit of the class of employees referred to in order that they may not become dependent and a burden on the State, has acted within its constitutional jurisdiction, then it seems to us that it must follow that placing the burden of supplying such funds upon the wrongdoers who make the contribution to the funds necessary is clearly within the constitutional power of the Legislature.

The Supreme Court, in the case of New York Central R. R. Co. v. White (supra) said: "One of the grounds of its (the public's) concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime." And in Mountain Timber Co. v. Washington (243 U. S. 219) the same court said: "It hardly would be questioned that the State might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed." The argument that the State cannot lawfully place that burden upon those who are directly and wrongfully responsible for it is not convincing. Where the death of an employee covered by the Workmen's Compensation Law is wrongfully caused by a third person, and the deceased leaves dependents who recover compensation from the employer or his insurance carrier, the employer or his insurance carrier who has paid such compensation may, under the provisions of section 29, recover against the wrongdoer the damages caused by his wrongful act, even though the recovery exceeds the amount of compensation paid to the dependents of the deceased employee. (Travelers Insurance Co. v. Padula Co., 224 N. Y. [fol. 20] 397; Matter of Zirpola v. Casselman, Inc., 237 N.

Y. 367; Travelers Insurance Co. v. Brass Goods Mfg. Co., 239 N. Y. 273.) The right to recover over against the wrongdoer, under the amendment of said section involved in this case, creates merely an additional liability against the wrongdoer for the amount paid to the State Treasurer under subdivisions 8 and 9 of section 15.

Section 130 of the Decedent State Law (Cons. Laws, ch. 13), and the statutes which it superseded conferring the right to recover damages for wrongful death, created a right of action unknown to the common law. (Whitford v. Panama R. R. Co., 23 N. Y. 465.) States having similar statutes "differ as to who may sue, for whose benefit, and the measure of damages." (New York Central R. R. Co. v. White, supra.)

In Travelers Insurance Co. vs. Padula Co. (supra) this court said:

"A civil liability and the right to recover damages for a wrongful act or neglect causing death are created solely by statute. At common law no civil action would lie for causing the death of a human being. Legislative enactment is the exclusive source and boundary of the liability and the remedy. It may create the cause of action, define the period of its existence, and the party by whom and the method in which it shall be enforced and prescribe the measure of damages and the beneficiaries."

All persons are under an obligation to the State not to wrongfully cause the death of one of its citizens, and the State may lawfully enact that if that obligation is violated the one so violating it shall pay to the State a sum not unjust or unreasonable to enable it to carry out the provisions of the Workmen's Compensation Law. The fact that the obligation is made to rest first upon the employer or his insurance carrier does not affect the right, but only provides for the manner in which the sum is ultimately to be collected from the wrongdoer. That practice has been adapted in many different actions for penalties, where the [fol. 21] proceeds, in part, go to the State.

The manner of collecting penalties and the disposition of the sums collected are matters which rest in the discretion of the Legislature, and it may lawfully make such disposi-

tion thereof as it determines may best carry out the purpose of a particular statute. (Missouri Pacific Ry. Co. v. Humes, 115 U. S. 512; Miami Copper Co. v. State, 7 Ariz. 179; Boyd v. Missouri Pacific Ry. Co., 249 Mo. 110.) The State of Alabama enacted a statute allowing punitive damages to be assessed against an employer for the mere negligence of an employee, resulting in death. In Pizitz Dry Goods Co. v. Yeldell (274 U. S. 112) the statute was held to be constitutional and the court said:

"Lord Campbell's Act and its successors, establishing liability for wrongful death where none existed before, the various Workmen's Compensation Acts, imposing new types of liability, are familiar examples of the legislative creation of new rights and duties for the prevention of wrong or for satisfying social and economic needs. Their constitutionality may not be successfully challenged merely because a change in the common law is effected. As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only upon those at fault but upon those [fol. 22] who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be presented."

In some States the statutes giving a right of action for wrongful death impose a penalty, which may be recovered for the benefit of the survivors named in the statutes. (Boyd v. Missouri Pacific Ry. Co. supra; Raisor v. Chicago, etc., R. R. Co., 215 Ill. 47, and cases cited in 8 Ruling Case Law, title Death, §118.) If the State may lawfully impose a penalty payable to the survivors of the deceased, it may impose an additional penalty, payable to the State itself, to enable it to carry on a State function. The fact that the statute limits the liability of one wrongfully causing he death of another to the payment of a pen-

alty only in case the one wrongfully killed is an employee under the Workmen's Compensation Law cannot be complained of by the defendant. That the liability of the defendant might legally have been made greater is not a reason why its legality as enacted should not be maintained. (People v. Braunstein, 248 N. Y. 308; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571.)

It is urged by the appellant that the desirability of establishing the funds under subdivisions 8 and 9 of section 15 does not justify a statute which compels it to pay one thousand dollars into the funds, because neither it nor the one it injured will benefit from such funds. It is a sufficient answer that the State will be benefited by such payment and that the defendant's wrongful act placed upon the employer or his carrier the burden, in the first instance, of [fol. 23] making the payment into the funds. (Sheehan Co. v. Shuler, supra.)

The statute does not contemplate the taking of property without due process of law. The defendant may avail itself of any defense which it has or ever had. It has a right to establish, if it can, that there could have been no recovery in the negligence action which it settled, and may test the validity of the awards against the insurance carrier by any defense which the carrier could have interposed, as it was not a party to that proceeding and is not bound thereby.

Subdivisions 8 and 9 of section 15 and section 29, construed together, and in connection with the other provisions of the Workmen's Compensation Law, are "component parts of a single scheme" and constitute a valid constitutional statute. The wrongdoer is made responsible for his wrongful act, the statute promotes the public welfare, and lawfully imposes a penalty upon the wrongdoer. It is uniform, in that it gives a right of action against all who wrongfully cause the death of an employee specified in the statute.

The judgment of the Appellate Division should be affirmed with costs.

IN COURT OF APPEALS OF NEW YORK

DISSENTING OPINION—Filed Aug. 6, 1929

LEHMAN, J. (dissenting):

The Workmen's Compensation Law was enacted by the Legislature, pursuant to authority expressly conferred by the Constitution of the State, article 1, section 19. Every employer subject to its terms must secure compensation to his employees and pay or provide compensation for their [fol. 24] disability or death arising out of and in the course of the employment. The industrial relations created by the employment justified the Legislature in substituting a more complete and equitable system of compensation for the inadequate remedy afforded at common law or by earlier statute for injury or death caused by an employer. Because of these industrial relations a new form of liability, though constituting a new burden, might be imposed upon the employer, perhaps to be borne ultimately by the public at large as an expense of the industry. (N. Y. Central R. R. Co. v. White, 243 U. S. 188; Matter of Jensen v. Southern Pacific Co., 215 N. Y. 514.)

The Legislature, instead of imposing upon each employer the entire responsibility for losses occurring in his own plant or work, might impose the burden upon the industry through a system of occupational taxes or enforced payments to an industrial fund required of persons connected with the industry. (Mountain Timber Co. v. Washington, 243 U. S. 219.) In this State the Legislature has provided that for certain disabilities payment of compensation or extra compensation should be made out of special funds created for that purpose, rather than by the individual employer. (Workmen's Compensation Law, §15, subd. 8 and 9.) Into each of such funds "the insurance carrier shall pay to the State Treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars." Under identical conditions all employers are required to contribute to these special funds and "the payments thus required are not [fol. 25] unfair and unreasonable in amount. The aggregate for the two funds is one thousand dollars. This is much less than the maximum payment which may be re-

quired according to the scales in case the employee leaves survivors entitled to death benefits, and seems not to exceed, if it equals, the average amount of the payments required in such cases." For these reasons the constitutionality of these provisions has been sustained both in this court and in the Supreme Court of the United States. Sheehan Co. v. Shuler, 265 U. S. 371, affg. State Treasurer v. Sheehan Co., 236 N. Y. 579; Matter of State Industrial Commission v. Newman, 222 N. Y. 363; N. Y. State Railways v. Shuler, 265 U. S. 379.)

Where the employee's disability or death resulted from the wrongful act of a party not in the same employ the liability of such party remained substantially unchanged. The injured employee, or, in case of his death, his dependents, might elect to pursue any remedy afforded by law against such party. If the employee, or his dependents, elect to take compensation under the Workmen's Compensation Law, then it is provided that the awarding of compensation shall operate as an assignment of the cause of action against such other party "to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the re-[fol. 26] covery against such other person actually collected, and the compensation provided or estimated by this chapter for such case." (Workmen's Compensation Law, §29.)

It is true that, as we have construed the section, it provides "that a party who negligently kills an employee under the act shall be liable to the dependents of the employee, * * * and not to his next of kin," and to that extent creates a new action in substitution for the action for causing death by negligence as defined by section 1902 of the Code of Civil Procedure. Since, however, the Legislature might have originally created a cause of action for the death of an employee in favor of the dependents rather than the next of kin of the deceased, the wrongdoer has no substantial ground for complaint. (Travelers Ins. Co. v. Padula

Co., 224 N. Y. 397.) There the Legislature exercised its undoubted power to create and define the liability and the remedy for causing the death of a human being. That power is not based upon its right to provide compensation for the disability or death of an employee as a liability on the part of his employer or a burden upon the industry. The considerations which have led the courts to sustain the legislation creating such a right to compensation have no application to legislation creating a liability against a wrongdoer, not in the same employ as the employee who has been injured or killed.

In 1922 the Legislature amended section 29 of the Workmen's Compensation Law by providing that "In case of the payment of an award to the state treasurer in accordance [fol. 27] with subdivisions nine and ten of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased." As stated in the majority opinion, "it is an attempt to remove the burden from one who has not committed a wrong, and to place it upon one who, by his wrongful act, has made the payment into the funds necessary."

That statement seems, as a matter of first impression persuasive that the Legislature must have power to place ultimate liability upon the person but for whose wrongful act no payment would have been required of the employer. Analysis, however, demonstrates, I think, that its persuasive force is illusory. The defendant has already paid to the dependent of the deceased more than the compensation provided by the Workmen's Compensation Law. If recovery or settlement had been less the dependent would have been entitled to receive payment of the deficiency from the employer or insurance carrier. In such case the employer or insurance carrier would not have been entitled to any repayment of the deficiency from the wrongdoer nor would such employer or insurance carrier have been compelled to make any payment to the State insurance fund. The wrongful act of the defendant has not caused any depletion of the insurance fund

The employer or insurance carrier is compelled to make a payment to such a fund only because the Legislature has [fol. 28] so decreed as part of its scheme of making payment of compensation to employees a burden on the industry as a whole. The defendant is not in the same employ as the deceased or as the persons who may subsequently be entitled to receive compensation from the fund for other injuries. The liability of the employer to make payments to such a fund is not in any true sense a damage flowing from the defendant's wrongful act. It is a payment in the nature of an industrial tax which the Legislature has imposed upon employers for the purpose of creating an industrial fund for the benefit of those who are part of the industry. The contingency upon which such liability is imposed is an injury of an employee "causing death in which there are no persons entitled to compensation". The defendant's wrong has caused the death. It has paid to the dependents and next of kin of the deceased the full compensation or damages allowed to them by statute for such death. Only because that payment was adequate to meet all claims for compensation which would otherwise have been a liability of the employer has the employer become subject to the tax, the required payment into the insurance fund. The question before us is not whether the Legislature may compel a wrongdoer to make good all damages caused by his wrongful act, but whether the Legislature may shift to the defendant the ultimate liability for the payment, in the nature of an industrial tax, imposed upon the employer.

Since the defendant stands in no industrial relation to the deceased or to the employee or to those who may receive compensation from the insurance fund, it seems to me quite [fol. 29] clear that the liability which the Legislature has attempted to impose may not be sustained upon analogy to an industrial tax. The additional cause of action in favor of an employer who has been compelled to make a payment into the insurance fund may be sustained, if at all, only as the result of the exercise of a legislative power to create a new cause of action for a penalty or damages for causing death by negligence. These powers are undoubtedly broad, yet they are not, I think, unlimited. Some reasonable basis must be found, I think, for the imposition of the penalty, or for the creation of a cause of action for damages

and there must be some reasonable basis for the classification upon which the creation of the new cause of action for damages or penalty is based. I fail to find such a basis in the present case.

The cause of action for a penalty or damages which the Legislature has attempted to create, arises not in every case where death is caused by wrongful act, nor even in every case where death is so caused and the deceased left no dependents or next of kin entitled to damages. Indeed in this case a dependent survived but the surviving dependent is not entitled to compensation under the Workmen's Compensation Act because she has already received adequate payment from the defendant. In other words, here a cause of action for a penalty or damages has been created by the Legislature because the defendant has paid to the surviving dependent full compensation for the injury caused by its wrong. If the defendant had failed to pay such damages and consequently the defendant had been entitled to the compensation from the employer, the defendant would not [fol. 30] have been liable for any penalty or damages beyond those which the dependent or next of kin might have recovered in an action against the defendant.

It is true that in such case the employer also would have been compelled only to pay compensation to the surviving dependent and would not have been compelled to pay an additional sum into the State insurance fund. If this factor were absent I assume that no one would seriously contend that the Legislature ever would or could have created an additional liability against a wrongdoer causing death in the contingency that the wrongdoer had already made full payment in damages to the dependents or next of kin of the person killed.

As I have already pointed out, the provision of the statute for payment by the employer into the insurance fund has been sustained on the ground that it is in the nature of an industrial tax imposed on all employers in the contingency of the death of an employee where the employer cannot be called upon to make any payment of compensation to any dependent of the person killed. It bears equally upon all employers under the same circumstances and is reasonable in amount, since it "seems not to exceed, if it equals, the average amount of the payments required" if a deceased

left surviving dependents entitled to death benefit. Here, on the contrary, the additional liability does not bear equally upon all wrongdoers causing death where no dependent or next of kin survive, and it is not reasonable in amount, for it is imposed in those cases where the damages already paid by a defendant exceed the rate of compensation to which a dependent survivor would be entitled under [fol. 31] the statute. It seems to me that the Legislature could not, after such payment, impose upon the defendant an additional liability in order to shift to the wrongdoer the ultimate burden of repaying to the employer the amount which the employer was required to pay into the insurance fund. None of the grounds upon which the courts have sustained the statute requiring such payment from the employer applies to the liability for repayment imposed upon this defendant. The Legislature could not have imposed upon the defendant a liability to make a direct payment into the insurance fund in the contingency that it had fully paid compensation to all survivors of the person whose death defendant caused. Such a classification would be so clearly unreasonable that it would not even bear any analogy to any reported cases. The Legislature has, I think, attempted to do by indirection what it could not do directly. That, I think, is equally beyond its powers.

For these reasons the judgment should be reversed and the complaint dismissed.

Cardozo, Ch. J.; Pound, Crane, and O'Brien, JJ., concur with Hubbs, J.; Lehman, J., dissents in opinion in which Kellogg, J., concurs.

Judgment affirmed.

Certificate to foregoing paper omitted in printing.

[fol. 32] In Supreme Court of New York, Appellate Division, Second Judicial Department

Lazansky, P. J.; Young, Kapper, Seeger, and Carswell, JJ.

Phœnix Indemnity Co., Plaintiff,

against

The Staten Island Rapid Transit Railway Company, Defendant

Submission of Controversy Upon an Agreed Statement of Facts under Sections 546-548 of the Civil Practice Act.

Jeremiah F. Connor, for the plaintiff.
Gardner Prime, for the defendant.

Opinion—Filed June 18, 1929

Seeger, J.:

Plaintiff is a domestic insurance corporation. Defendant is a domestic railroad corporation. On and prior to February 24th, 1927, Joseph Perroth was in the employ of one Anderson. Said Anderson, in compliance with the provisions of the New York Workmen's Compensation Law, had insured himself with plaintiff against liability for compensation for injury to his employees including said Perroth. On February 24th, 1927, while acting within the scope of his employment by said Anderson, said Perroth was struck by a train of the defendant, receiving injuries which caused his death solely by reason of the negligence of the defendant without any negligence of his contributing [fol. 33] thereto. Said Perroth left him surviving a dependent, his widow. Prior to the institution of this action, the administratrix of said Perroth brought suit against defendant herein to recover damages for the death of said Perroth. Said suit was settled and discontinued before trial by the defendant therein, which is this defendant herein, paying to said administratrix a sum in excess of the amount which said dependent widow, Perroth, would have been entitled to by way of compensation if claim had been made by her, pursuant to the New York Workmen's Com-

pensation Law, defendant receiving a general release therefor.

Thereafter, and prior to the institution of this action and pursuant to subdivisions 8 and 9 of section 15 of the New York Workmen's Compensation Law, two five hundred dollar awards were made in favor of the Treasurer of the State of New York jointly against said Anderson and plaintiff herein.

Subdivision 8 of said section 15 of the New York Workmen's Compensation Law provides among other things as follows:

"The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars."

And subdivision 9 of said section 15 of the Workmen's Compensation law provides among other things as follows:

"The employer, or if insured, his insurance carrier, shall pay into the vocational rehabilitation fund for every case of injury causing death, in which there are no persons entitled to compensation, the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund."

[fol. 34] Said awards were paid by plaintiff to the State Treasurer December 27th, 1927.

At the times mentioned, section 29 of the New York Workmen's Compensation Law provided as follows:

"* * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased."

The questions submitted to this court for decision are:

1. Under the above facts, was the State Treasurer entitled to the awards made in his favor and paid by plaintiff, as stated in Paragraphs 10 and 11, supra?

II. If the first question is answered in the affirmative, is plaintiff entitled to recover the amount of said awards from defendant by reason of Sec. 29 of the New York Workmen's Compensation Law?

The defendant contends that the State Treasurer was not entitled to said awards for the reason that there was a person entitled to compensation at the time of the death of said employee within the meaning of the statute in question, that said words "no persons entitled to compensation" mean no persons entitled to compensation at the death of the deceased, and that the aforesaid provision of Section 29 of the New York Workmen's Compensation Law, which gives to the insurance carrier liable for the award a cause of action for the amount of such payment in addi- [fol. 35] tion to any cause of action by the legal representatives of the deceased, takes the property of the defendant without due process of law and further violates the provisions of the State and Federal Constitutions guaranteeing equal protection before and under the law.

These provisions of subdivisions 8 and 9 of section 15 of the Workmen's Compensation Law have been passed upon by the Court of Appeals in Matter of McNamara v. New York State Railways (233 N. Y. 681, affirmed under the title New York State Railways v. Shuler, 265 U. S. 379). They have also been considered in Matter of Treasurer of the State of New York v. Niagara Falls Power Co. (241 N. Y. 521), a case quite similar to the one at bar, where it was held that an award should be made to the State Treasurer under subdivisions 7 and 8 of section 15 of the Workmen's Compensation Law. In Matter of Zirpola v. Casselman, Inc., (237 N. Y. 367) the Court of Appeals discussed the effect of section 29 of the Workmen's Compensation Law, and reference was made to the very provision of the section under which the present controversy arises, the court (Cardozo, J.) says:

"We are confirmed in this conclusion by a recent amendment which brings out into clear relief the meaning of the lawmakers. Since Travelers Insurance Co. v. Padula Company was decided, section 29 has been changed by the addition of the following provision: 'In case of the payment of an award to the state treasurer in accordance with sub-

divisions nine and ten of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such [fol. 36] payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased.' Subdivisions 9 and 10 of section 15 are to the effect that 'the insurance carrier shall pay to the State Treasurer for every case of injury causing death, in which there are no persons entitled to compensation, (i. e., to death benefits under the act) the sum of $500' (Matter of State Treasurer v. West Side Trucking Co., 233 N. Y. 202). Even though there are no such persons, no dependents in the narrow sense, the cause of action of the legal representatives is not to be affected. Return to the employer or carrier of the payments made into the treasury is to be 'in addition to any cause of action by the legal representatives of the deceased.' The recognition of a cause of action as possible in such conditions is equivalent to the recognition of its existence for the benefit of next of kin."

While the constitutionality of the provision now in question was not in issue in the Zirpola case, there is sufficient indication in the above quotations that the Court of Appeals had no doubt as to the propriety of this legislation.

In my judgment, the provisions of section 29 here involved should be upheld, and both questions submitted should be answered in the affirmative, and plaintiff should have judgment against defendant for the sum of $1,000., with interest from December 27, 1927, with costs.

[File endorsement omitted.]

Certificate to foregoing paper omitted in printing.

[fol. 37] IN COURT OF APPEALS OF NEW YORK

PHŒNIX INDEMNITY CO., Respondent,
ag'st
THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, Appellant

REMITTITUR—May 29, 1929

Be it remembered that on the 7th day of February, in the year of our Lord one thousand nine hundred and twen-

ty-nine, The Staten Island Rapid Transit Railway Company, the appellant in this cause, came here unto the Court of Appeals, by Cravath, deGersdorff, Swaine & Wood, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department, and Phœnix Indemnity Co., the respondent in said cause, afterwards appeared in said [fol. 38] Court of Appeals by Jeremiah F. Connor, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Frederick H. Wood, of counsel for the appellant, and by Mr. Jeremiah F. Connor, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs. On the argument of the appeal the appellant contended that the statute under which its liability has been established was in violation of the Fourteenth Amendment of the Constitution of the United States in that it deprived the appellant of the equal protection of the laws and also deprived the appellant of property without due process of law. The Court considered this contention and overruled it.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law.

Therefore it is considered that the said judgment be affirmed with costs, *oc., oc.*, as aforesaid.

And hereupon, as well as the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

[fol. 39] Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Clerk's certificate to foregoing papers omitted in printing.

[fol. 40] IN SUPREME COURT OF NEW YORK

PHŒNIX INDEMNITY CO., Plaintiff,
against
THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, Defendant

JUDGMENT—Filed June 18, 1929

This proceeding having been commenced by the filing of an Agreed Statement of Facts in the Office of the Clerk of the County of Richmond, on or about the 2nd day of April, 1928, and the proceeding having been tried before the Appellate Division of the Supreme Court, Second Judicial Department, on the 12th day of June, 1928, and the said Appellate Division having rendered its decision adjudging that the plaintiff have judgment against the defendant for the sum of One thousand ($1,000.) Dollars, with interest from December 27th, 1927, with costs, and an Order and Judgment having been duly entered in the Office of the Appellate Division, Second Judicial Department, in the Borough of Brooklyn, City and State of New York, and a certified copy of said Order and Judgment having been filed in the Office of the Clerk of the County of Richmond, and a Judgment having been entered in the Office of the Clerk of the County of Richmond on October 22nd, 1928, in favor of the plaintiff and against the defendant in the sum of One thousand ninety-four and 33/100 ($1,094.33) Dollars, and the defendant having appealed to the Court of Appeals of the State of New York from said Order of the Appellate Division, and from said Judgment entered in the office of the Clerk of [fol. 41] the County of Richmond as aforesaid, and said appeal having come on to be heard, and the Court of Appeals having rendered its decision affirming said judgment with costs, and over-ruling the contention of the appellant that the statute under which its liability has been established was in violation of the Fourteenth Amendment of the Constitution of the United States in that it deprived the appellant of the equal protection of the laws, and also deprived the appellant of property without due process of law, and the Order and Proceedings of the Court of Ap-

peals having been remitted to the Appellate Division of the Supreme Court, Second Judicial Department, and an Order having been entered herein by the said Appellate Division, making the Judgment of the Court of Appeals the Judgment of this Court, and directing that judgment be entered accordingly with costs in the Court of Appeals in favor of the plaintiff and against the defendant, and a certified copy of said Order of the Appellate Division having been filed herein, and plaintiff's costs having been taxed herein,

Now, on motion of Jeremiah F. Connor, attorney for the plaintiff, it is hereby

Adjudged that said Judgment appealed from be and the same hereby is affirmed, and that the plaintiff, Phœnix Indemnity Co., recover of the defendant, The Staten Island Rapid Transit Railway Company the sum of $113.75 costs in the Court of Appeals as taxed, and have execution therefor.

Enter.

(Signed) James L. Vail, Clerk.

[File endorsement omitted.]

Certificate to foregoing paper omitted in printing.

[fol. 42] In Court of Appeals of New York

[Title omitted]

Petition for Appeal and Assignments of Error—Filed July 19, 1928

Considering itself aggrieved by the decision and judgment of the Court of Appeals of the State of New York in the above-entitled cause dated May 28th, 1929, and by the judgment entered thereon in the office of the Clerk of the Supreme Court of the State of New York, County of Richmond, on June 18, 1929, The Staten Island Rapid Transit Railway Company, the defendant, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

And said The Staten Island Rapid Transit Railway Company, assigns the following errors in the record and proceedings in said case:

1. The Court of Appeals of the State of New York erred in holding constitutional that portion of Section 29, as amended, of Chapter 67 of the Consolidated Laws of the State of New York known as the Workmen's Compensation Law (Laws of 1922, Chapter 615) which reads:

[fol. 43] "* * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. * * *"

and in not holding that said portion of said Section deprives Appellant of its property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

2. The Court of Appeals of the State of New York erred in holding constitutional, as construed by said Court, that portion of Section 29, as amended, of Chapter 67 of the Consolidated Laws of the State of New York known as the Workmen's Compensation Law, (Laws of 1922, Chapter 615) which reads:

"* * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. * * *"

and in not holding that said portion of said Section, as construed by said Court, deprives Appellant of its property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

3. The Court of Appeals of the State of New York erred in holding constitutional that portion of Section 29, as amended, of Chapter 67 of the Consolidated Laws of the

[fol. 44] State of New York known as the Workmen's Compensation Law (Laws of 1922, Chapter 615), which reads:

"* * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. * * *"

and in not holding that said portion of said Section deprives Appellant of the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States.

4. The Court of Appeals of the State of New York erred in holding constitutional, as construed by said court, that portion of Section 29, as amended, of Chapter 67 of the Consolidated Laws of the State of New York known as the Workmens Compensation Law (Laws of 1922, Chapter 615), which reads:

"* * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. * * *"

and in not holding that said portion of said Section as construed by said court deprives appellant of the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States.

[fol. 45] For which errors the appellant prays that the said decision and judgment of the Court of Appeals of the State of New York dated May 28, 1929, and the final judgment entered thereon in the office of the Clerk of the Supreme Court of the State of New York, County of Richmond, on June 18, 1929, in the above entitled cause be re-

versed and judgment rendered in favor of said appellant, and for costs.

The Staten Island Rapid Transit Railway Company,
by Frederick H. Wood, Counsel.

Dated New York, N. Y., July 5th, 1929.

[File endorsement omitted.]

Certificate to foregoing paper omitted in printing.

[fol. 46] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 19, 1929

The appellant in the above-entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States, from the decision and judgment of the Court of Appeals of the State of New York dated May 28, 1929 and from the final judgment made and entered thereon in the above-entitled suit by the Supreme Court of the State of New York, County of Richmond, on the 18th day of June, 1929, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided; it is

Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the said decision and judgment of the Court of Appeals of the State of New York and from the said final judgment entered thereon in the Supreme Court of the State of New York, [fol. 47] County of Richmond, as provided by law, and it is

Further ordered that the Clerk of the Supreme Court of the State of New York, County of Richmond, shall prepare and certify a transcript of the record, proceedings and judgment, including the opinion of the Court of Appeals of the State of New York, and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of this date, and it is

Further ordered that security for costs on appeal be fixed in the sum of $500.

Dated July 9, 1929.

Benjamin N. Cardozo, Chief Judge of the Court of Appeals of the State of New York.

[File endorsement omitted.]

Certificate to foregoing paper omitted in printing.

[fol. 48] Citation, in usual form, Filed July 18, 1929, omitted in printing.

[fol. 49] Bond on Appeal for $500.00 approved and filed July 18, 1929, omitted in printing.

[fol. 50] IN SUPREME COURT OF NEW YORK

[Title omitted]

STIPULATION, RE TRANSCRIPT OF RECORD—Filed July 18, 1929

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the following are the only necessary papers in this action to be included in the transcript of the record to be certified and filed with the Clerk of the United States Supreme Court:

1. Agreed statement of facts with acknowledgments and affidavit of good faith annexed thereto.
2. The opinion of the Court of Appeals of the State of New York.
3. The opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department.
4. The decision and judgment of the Court of Appeals of the State of New York.
5. The judgment of the Supreme Court of the State of New York, County of Richmond, dated June 18, 1929.
6. Petition for appeal to the United States Supreme Court and Assignment of Errors.

[fol. 51] 7. Order allowing appeal.

8. Citation.
9. Bond.

Dated New York, July 17, 1929.

Jeremiah F. Connor, Counsel for Appellee. Frederick H. Wood, Counsel for Appellant.

[File endorsement omitted.]

Certificate to foregoing paper omitted in printing.

[fol. 52] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Aug. 21, 1929

Comes now the appellant and adopts the errors assigned by it in its petition for appeal herein dated July 5, 1929, as the statement of the points to be relied upon by it on said appeal and represents that the whole of the record as filed and as stipulated by and between counsel herein by stipulation dated July 17, 1929, is necessary for the consideration of said points and therefore requests that the entire record so stipulated and filed be printed.

Dated New York, N. Y., August 20, 1929.

Frederick H. Wood, Counsel for Appellant. Office and Post Office address: 15 Broad Street, Borough of Manhattan, New York, N. Y.

To the Clerk of the Supreme Court of the United States; Jeremiah F. Connor, Counsel for Appellee, 80 Maiden Lane, Borough of Manhattan, New York, N. Y.

Service of the foregoing Statement of Points and Designation of Record is hereby acknowledged this 20 day of August, 1929.

Jeremiah F. Connor, Counsel for Appellee.

[fol. 53] [File endorsement omitted.]

[Endorsed on cover:] File No. 34,438. New York Supreme Court. Term No. 307. The Staten Island Rapid Transit Railway Company Appellant, vs. Phœnix Indemnity Co. Filed August 7, 1929. File No. 34,438.

FILE COPY

FILE
SEP 5
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM 1929.

No. 307.

PHOENIX INDEMNITY CO.,

Appellee,

against

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,

Appellant.

APPELLANT'S STATEMENT ON JURISDICTION.

FREDERICK H. WOOD,
Counsel for Appellant.

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IN THE

Supreme Court of the United States

PHOENIX INDEMNITY CO., Appellee, against THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, Appellant.	October Term 1929 No. 307.

APPELLANT'S STATEMENT ON JURISDICTION.

The case and the record in the above-entitled appeal were filed with the clerk of this court on August 7, 1929. This statement is filed within thirty days thereafter pursuant to Rule 12.

A. *Statutory Provisions Relied on.*

The statutory provisions believed to sustain the jurisdiction of this court are that portion of subsection (a) of Section 344, Title 28, U. S. C. A. (Judicial Code, Sec. 237, as amended), which gives this court jurisdiction to review upon a writ of error:

> "A final judgment * * * in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question * * * the validity of a statute of any State, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity * * *"

and subsection (a) of Section 861, Title 28, U. S. C. A., which provides that all relief formerly obtainable by writ of error is now obtainable by appeal.

B. *Date of Judgment and of Appeal.*

This appeal is from a judgment and decision of the Court of Appeals of the State of New York, dated May 28, 1929 (R. 23), upon which a final judgment in the suit was entered in the office of the clerk of the Supreme Court of the State of New York, County of Richmond, on June 18, 1929 (R. 40, 41).

The appeal was allowed by the Court of Appeals on July 9, 1929 (R. 46, 47), or within three months after the entry of the final judgment appealed from on an application presented to said court on July 5, 1929 (R. 42-45), all in accordance with U. S. C. A. Title 28, Section 350; R. S. Section 1008, as amended.

C. *Nature of Case and of Rulings Below.*

The sole question presented on this appeal is the constitutionality of Section 29 of the New York Workmen's Compensation Law (Laws of 1922, Chap. 615), as interpreted by the Court of Appeals of that State.

This suit was instituted in the Supreme Court of the State of New York, County of Richmond, as authorized by the State practice (C. P. A., Secs. 546-548), by the filing of an agreed statement of facts and without formal pleadings, and was brought by the appellee to recover from the appellant, under said Section 29 of the New York Workmen's Compensation Law, a sum equal to two awards, each in the sum of $500, made pursuant to subsections (8) and (9) of Section 15 of said Workmen's Compensation Law, in favor of the Treasurer of the State of New York and against appellee, who had paid the awards to the State Treasurer prior to the institution of this suit (R. 1-9). In accordance with the State practice it was tried in the first instance by the Appellate Division of the Supreme Court, Second Department, and resulted in

a judgment against the appellant and in favor of the appellee for the sum of $1,000 and costs (R. 40, 41), from which an appeal was taken to the State Court of Appeals. The appellant defended both in the court of first instance (the Appellate Division) and in the Court of Appeals upon the ground that the State statute, pursuant to which recovery was allowed (New York Workmen's Compensation Law, Sec. 29), deprived the appellant of its property without due process of law, and deprived it of the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States. That the Federal question thus presented was raised in, and considered and passed upon by both the court of first instance and the Court of Appeals, is necessarily involved in the decision upon which final judgment has been entered, and that such decision was in favor of the validity of said State statute expressly appears from the opinion of the Appellate Division (R. 32-36, see particularly beginning at bottom of p. 34), from the opinion of the Court of Appeals (R. 12-23, see particularly beginning the middle of p. 15), from the dissenting opinion of Judge Lehman of the Court of Appeals concurred in by Judge Kellogg (R. 23-31), and from the remittitur of the Court of Appeals (R. 37-39, particularly p. 38). That the question presented has been properly raised in this court appears from the assignment of errors (R. 42-45).

D. *Cases Believed to Sustain the Jurisdiction of This Court.*

People ex rel. Bryant v. *Zimmerman,* 49 Sup. Ct. Rep. 61 (1928).

Whitney v. *People of State of California,* 274 U. S. 357 (1927).

Respectfully submitted,

FREDERICK H. WOOD,
Counsel for Appellant.

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FILE
FEB 24
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929

No. 307

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,

Appellant,

against

PHOENIX INDEMNITY CO.

BRIEF FOR APPELLANT.

FREDERICK H. WOOD,
Attorney for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1929

No. 307

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,
Appellant,

against

PHOENIX INDEMNITY CO.

BRIEF FOR APPELLANT.

The Opinions Below.

The opinion of the Court of Appeals of the State of New York (R. 6-14) is reported in 251 N. Y. 127; and the opinion of the Appellate Division (R. 21-24) in 224 App. Div. 346.

Jurisdiction of This Court.

Pursuant to paragraph 1 of Rule 12 of the Rules of this Court, and within the time required therein, the appellant filed with the clerk of this Court its printed statement disclosing the basis on which the jurisdiction of this Court to review on appeal the judgment below was invoked, and on October 28, 1929 the Court, by order

duly entered, found that probable jurisdiction had been shown.

STATEMENT.

This is an appeal from a decision of the Court of Appeals of the State of New York affirming a judgment in the sum of $1,000 in favor of respondent (plaintiff below) in an action brought under § 29 of the Workmen's Compensation Law of that State for the recovery of two payments of $500 each made by respondent to the State Treasurer as custodian of two special funds created by subsections 8 and 9 of § 15 of the same Law. Two Judges of the Court of Appeals dissented upon the ground that § 29, and particularly as construed and applied to the facts of this case, violated, the due process and equal protection clauses of the Fourteenth Amendment. These are the only questions involved on this appeal.

Analysis of the Statutes Involved.

Compensation accruing to injured employees, or to their dependents in case of death, under the Workmen's Compensation Law, is, as a general rule, required to be paid directly by the employer or his insurance carrier, and not, as in some states, out of a state fund created for the purpose.

Subsection 8 of § 15 (added in 1917, Laws of 1917, Ch. 705-§ 3) and subsection 9 of the same section* (added in 1920, Laws of 1920, Ch. 760-§ 1), however, make

*Subsections 8 and 9 of § 15 are set forth in full in the Appendix, post, at pages 32-33.

provision for additional compensation in specified exceptional cases to be paid out of two special funds, created and maintained through the payment into each of the sum of $500 "in every case of injury causing death in which there are no persons entitled to compensation". These payments are required to be made in the one case (subsection 8) by the insurance carrier; and in the other (subsection 9) by the employer, or, if insured, by his insurance carrier. The payments so required to be made were sustained by this Court in *Sheehan Company* v. *Shuler,* 265 U. S. 371, *N. Y. State Rys.* v. *Shuler,* 265 U. S. 379, as being in the nature of "occupation taxes". The judgment below was for the recovery of two such payments of $500 each, made by the respondent into said funds, for the recovery of which it brought suit under § 29 as amended.

Section 29* (Consol. Laws, Ch. 67, § 29), as originally enacted and now, provides that in the event of injury or death of a person, entitled to compensation, through the negligence or wrong of another not in the same employ, such injured employee (or, in the case of his death, his dependents) may elect whether to take compensation or to pursue his remedy against the third party wrongdoer. If he (or his dependents) elects to pursue the latter, and the amount recovered in suit or settlement equals or exceeds the compensation accruing under the Compensation Law, the person so electing disentitles himself to the receipt of compensation. If, on the other hand, the amount so recovered is less than the compensation accruing under the statute, the person entitled to the same is allowed, as

*Section 29 is set out in full in the Appendix, post, at pages 33-35.

compensation, the difference between the amount of such full compensation and the amount so recovered. If the injured employee (or his dependents) elects to take the full amount of compensation to which entitled under the Compensation Law, its acceptance operates as an assignment of the cause of action against the third party wrongdoer to the employer or insurance carrier.

The wrongful death action given by the New York laws (Decedent Estate Law, § 130, Laws 1920, Ch. 919, § 1)* is compensatory in character and requires that full compensation be made by the wrongdoer. It will be observed that under § 29 a third party wrongfully injuring or causing the death of another, protected by the Compensation Law, must in every case make full restitution for his wrong.

After the enactment of subsections 8 and 9 of § 15, and in 1922, § 29 was amended (Laws 1922, Ch. 615, § 1) so as to provide that every third party wrongfully causing the death of a person entitled to compensation should, in addition to the full liability imposed by the wrongful death statute, be liable to the deceased's employer, or to his insurance carrier, for any payments made by them or either of them into the special funds created by subsections 8 and 9 of § 15.

It will be observed that § 29 as so amended in no wise affects either the creation or maintenance of such special funds, which continue to be maintained by payments made by employers and their insurance carriers. Nor does it affect the amount of the compensation to

*Section 130 of the Decedent Estate Law is set forth in the Appendix, post, at pages 35-36.

which the surviving dependents of the deceased are entitled. Nor does it affect or diminish the statutory liability of the wrongdoer under the wrongful death act. It is in effect a statute of indemnity under which such third party wrongdoer, in addition to remaining liable in an action for compensatory damages growing out of his wrongful act, is required to indemnify the employer or his insurance carrier for payments made into these special funds.

The Facts.

One Perroth was killed, through appellant's negligence, while acting within the scope of his employment by one Anderson, who had insured himself with the respondent against liability under the Workmen's Compensation Law (R. 1-2). Perroth left surviving him a dependent, his widow, entitled to compensation on account of his death (R. 2). The administratrix of his estate brought a wrongful death action against the appellant, for the benefit of his widow, for the recovery of damages, which was settled by the appellant for the sum of $15,000 (R. 2). By the acceptance of this settlement, which exceeded the compensation to which the widow was entitled under the Compensation Law, the widow became disentitled to compensation under said Law. Thereafter, two awards for $500 each were made against and paid by the respondent under subsections 8 and 9 of § 15 of the Compensation Law, for the amount of which respondent obtained a judgment below against the appellant under § 29 (R. 2, 4).

The Effect of the Statute as Construed by the State Court and as Applied to the Facts of This Case.

Subsections 8 and 9 of § 15 provide for payments into special funds by the employer or his insurance carrier only "in case of injury causing death in which there are no persons entitled to compensation". Since a person entitled to compensation, to wit, the widow, survived, the appellant contended in the courts below that the awards paid by respondent were not authorized by the statute and that hence appellant was not responsible therefor. Both the Court of Appeals and the Appellate Division construed the statute as requiring the payment of such awards, where a surviving dependent became disentitled to compensation by the settlement of a wrongful death action for an amount equalling or exceeding the amount accruing under the Compensation Law, as well as where there was no surviving dependent entitled to compensation at the time of decedent's death (R. 8, 23-24). This interpretation, although contrary to the interpretation placed upon the Federal Employers' Liability Act by this Court in *Chicago, B. & Q. R. R. Co.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161, is, of course, binding upon this Court.

It will be observed, however, that as construed by the state court, where there is such a dependent the liability of the third party wrongdoer to indemnify the employer or the insurance carrier for payments into these special funds, in addition to making full restitution for its wrong by the payment of compensatory damages, accrues only when the compensatory damages recovered in suit or settlement equals or exceeds the com-

pensation to which the dependent would have been entitled under the Law. Under the state court's construction of § 29 and the related sections, if the amount recovered in such action had been less than such compensation, the surviving dependent would have been entitled to receive the difference as compensation. The result would then be that neither the respondent nor the employer would have been required to make any payments into the special funds under subsections 8 and 9 of § 15, and the appellant in turn would have incurred no liability under § 29. Also, if Perroth's widow had elected to take under the Compensation Law, subsections 8 and 9 of § 15 would have been inoperative, and appellant's liability would have been confined to making full restitution for its wrong in an action for compensatory damages.

As interpreted by the court below, therefore, where dependents survive, only those third party wrongdoers causing the death of the decedent are liable (1) when the dependent elects to pursue his remedy at law against the wrongdoer; and (2) when the amount recovered equals or exceeds the compensation to which such dependent would otherwise have been entitled under the Compensation Law. The liability of all other wrongdoers is limited to making full restitution for the wrong committed. And the liability of the particular wrongdoer would be similarly limited if, although equally at fault, the person killed had been one not entitled to the benefits of the Workmen's Compensation Law, or one who, so entitled, was not acting within the scope of his employment at the time, or, although the same person, if the amount recovered in settlement or judgment had been less than the compensation to which his survivors were entitled under the Compensation Law.

The Questions Presented.

(1) Does a state law, which requires a person wrongfully causing the death of another, not in his employ, to indemnify the decedent's employer or the latter's insurance carrier for payments made into a special fund created by such law, which payments have been sustained as in the nature of an occupation tax levied upon the industry, in addition to making full restitution for his wrong by way of compensatory damages, offend the due process and equal protection clauses of the Fourteenth Amendment?

(2) Does such a law so construed as to make such liability dependent upon [1] the pursuit by the survivor of his remedy at law against the wrongdoer; and [2] the recovery in such suit of an amount equalling or exceeding compensation to which such survivor would otherwise be entitled, so offend?

The Dissenting Opinion.

Judge Lehman (with whom Judge Kellogg concurred) dissented (R. 15) upon the grounds (1) that the provision in question was unrelated to the objects or purposes of the Workmen's Compensation Law and could not be sustained because of its inclusion therein, or upon the reasoning by which such acts generally have been sustained; and (2) that it could not be sustained as an exercise of legislative power to create a new cause of action, since there is lack of a reasonable basis either for the creation of such cause of action or for the classification upon which it is based.

Specification of Errors.

There follows a specification of the assigned errors to be urged by the appellant:

1 and 3. The Court of Appeals of the State of New York erred in holding constitutional that portion of Section 29, as amended, of Chapter 67 of the Consolidated Laws of the State of New York known as the Workmen's Compensation Law (Laws of 1922, Chapter 615) which reads:

> "* * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. * * *"

and in not holding that said portion of said Section deprives the appellant of its property without due process of law and denies to the appellant the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States. (R. 28-29).

2 and 4. The Court of Appeals of the State of New York erred in holding constitutional, as construed by said court, that portion of Section 29, as amended, of Chapter 67 of the Consolidated Laws of the State of New York known as the Workmen's Compensation Law (Laws of 1922, Chapter 615) which reads:

> "* * * In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased. * * *"

and in not holding that said portion of said Section, as construed by said court, deprives the appellant of its property without due process of law and denies to the appellant the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States. (R. 28-29).

ARGUMENT.

I.

THIS CASE PRESENTS NONE OF THOSE CONSIDERATIONS BY REASON OF WHICH THE WORKMEN'S COMPENSATION LAWS HAVE BEEN SUSTAINED, AND THE PARTICULAR PROVISION UNDER REVIEW MAY BE SUSTAINED, IF AT ALL, ONLY AS AN EXERCISE OF THE POWER OF THE STATE TO CREATE A NEW CAUSE OF ACTION FOR A PENALTY OR DAMAGES FOR CAUSING DEATH BY NEGLIGENCE.

1. The provision under review is neither an integral nor an essential part of the Workmen's Compensation Law, nor has it any relation to its objects and purposes.

It is plain from the foregoing that neither the objects, purposes or administration of the Workmen's Compensation Law will be in the slightest degree affected whether the provision under review be sustained or not. The compensation to be received by employees or their surviving dependents remains the same in either event. The liability of the third party wrongdoer to make full restitution for his wrong remains unimpaired. In either event, appellant cannot escape liability to make full compensation for its negligence.

The requirement is that such third party wrongdoer shall in addition indemnify the employer or his insurance carrier for payments made into the special funds created by subsections 8 and 9 of § 15, out of which additional compensation is paid under the exceptional

circumstances for which those subsections make provision. But neither the creation nor maintenance of such funds is in any way affected by § 29. That section does not provide for payment into such funds by third party wrongdoers, but only that such persons shall indemnify the employer or insurance company for payments made by them. The creation of the funds and the requirement that they should be maintained by such contributions antedates by several years the provision now under review. Neither does the statute provide that, if such payments are not made by the insurance company, by reason of its insolvency, or for any other reason, the third party wrongdoer himself shall pay into the fund the amounts required to be paid by the insurance company. The absence of such a provision clearly indicates that the legislative purpose was to indemnify the insurance carrier, rather than to provide either directly or indirectly for the maintenance of the fund at the expense of the third party wrongdoer.

The statement in the majority opinion (R. 14) that "Subdivisions 8 and 9 of section 15 and section 29, construed together, and in connection with the other provisions of the Workmen's Compensation Law, are 'component parts of a single scheme' " is accurate only in the sense that they are to be found in a single statute. The provision under review is neither an integral nor essential part of the scheme of workmen's compensation. It derives no validity from its mere inclusion in a statute, the general objects and purposes of which have been upheld. It therefore becomes important to consider the basis upon which the validity of such statutes rest; and, if it appears

that there is a complete absence of those considerations by reason of which such laws have been sustained, the mere fact that this provision is to be found in such a statute becomes wholly immaterial.

2. The provision under review derives no aid from the considerations by reason of which the validity of workmen's compensation laws have been sustained. On the contrary, such considerations are persuasive that such provision is invalid.

The question presented is entirely unlike that presented in other cases in which this Court has sustained workmen's compensation laws defining the rights and obligations of employers and employees *inter sese*.

On the contrary, the reasoning by which such acts have been sustained is persuasive of the unconstitutionality of the provision in question. As pointed out in the dissenting opinion, these laws rest primarily upon the industrial relations existing between employer and employee by reason of which it is competent for a legislature to substitute a more complete and equitable system of compensation for the inadequate remedies of the common law in the form of new liabilities imposed upon the employer and to be borne ultimately by the public at large as an expense of the industry. (Dissenting opinion, R. 15.)

In some of the earlier cases, notably *N. Y. Central R. R. Co.* v. *White*, 243 U. S. 188, the court stressed the reciprocal benefits conferred upon employer and employee alike by such loss. Subsequent cases, however, make it plain that, as pointed out in the dissenting opinion, these

laws rest fundamentally upon the existence of the status of employer and employee and upon the "industrial relations" existing between them.

In *Arizona Employers' Liability Cases,* 250 U. S. 400, an act of that State whereby, as distinguished from prior cases, the employer received no compensating benefits by way of immunity from common law liability, was sustained. This statute was sustained upon the ground that in regulating the liability of employer and employed, as engaged in a common enterprise, injuries to a workman "constitute a part of the unavoidable expense of hazardous industries" and could be regarded as part of the cost of the business or common undertaking to be assumed by the employer, to whom the opportunity of reimbursement was afforded through the price of his product (p. 425). Perhaps the most complete exposition of the grounds upon which such acts have been sustained, including the philosophy of the later as well as of the earlier cases, is that to be found in the opinion of Mr. Justice Sutherland in *Cudahy* v. *Parramore,* 263 U. S. 418. In this opinion it is expressly stated that this legislation "rests upon the status" created by the relationship of employer and employee engaged in the pursuit of a common undertaking, in which one contributes capital and the other labor, and justifying the imposition of the cost of injuries to employees as a part of the cost of the common undertaking to be borne as a cost of the business.

But the status of the appellant and the deceased was not that of employer and employee. They were not engaged in a common undertaking. Nor was the appellant engaged in any common undertaking with the deceased's employer or with the respondent insurance company.

It was an entire stranger to all three. It was guilty of wrong in that it negligently caused the death of the deceased. For that it has made full restitution. It committed no wrong against either the deceased's employer or the respondent and breached no legal duty to either in causing the deceased's death.

It is said, however, in the majority opinion below, that since subsections 8 and 9 of § 15, under which awards were paid by the insurance carrier into the special funds created by those sections, have been declared constitutional, *Sheehan Company* v. *Shuler,* 265 U. S. 371, and *N. Y. State Railways* v. *Shuler,* 265 U. S. 379, the subsequent amendment of § 29, whereby the third party wrongdoer is required to indemnify the insurance carrier for such payments, must likewise be constitutional. This is a clear *non sequitur.* These cases were decided on the authority of *Mountain Timber Company* v. *Washington,* 243 U. S. 219, in which employers' contributions to such funds were sustained as being in the nature of "occupation taxes". It will scarcely be contended that indemnification of the insurance company is in the nature of an occupation tax for those in the business of wrongfully killing others, or for the privilege of continuing such occupation.

There is thus a complete absence of the social, economic and legal considerations by which the constitutionality of workmen's compensation laws has been sustained.

On the other hand, their very absence is persuasive of the conclusion that the requirement that a complete stranger should, in addition to making full compensation

for his wrong, indemnify an insurance company for payments required to be made by it under its contract of insurance, to be used to further the purposes of the Workmen's Compensation Law. Such a provision constitutes a mere arbitrary exaction, whereby the property of one person is taken for a purely private purpose for the benefit of another, to whom the party liable is a complete stranger and towards whom it has committed no breach of duty.

II.

AS AN ATTEMPTED EXERCISE OF LEGISLATIVE POWER TO CREATE NEW CAUSES OF ACTION, THE PROVISION UNDER REVIEW VIOLATES BOTH THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

1. It violates the due process clause since there is no reasonable basis for the creation of the cause of action established, which arbitrarily takes the property of one person for the private use and benefit of another.

The power to create new causes of action unknown to the common law, while broad, is not unlimited, but, like other powers, is subject to the restrictions of the Fourteenth Amendment. Within constitutional limits the state may regulate contractual relations and establish new torts. Under the police power it may impose new duties to private persons as well as to the state, and provide for the recovery of damages for their violation. In short, it may create new rights and wrongs and provide for the protection of the former and redress of the latter at the instance of the injured party. But in every such instance the recovery allowed is for breach of some positive duty to the person entitled to such recovery. This is not such a case.

The appellant committed no wrong against the respondent. It sustained no relation, contractual or otherwise, thereto. The wrong it committed was committed against the deceased and his widow. For this wrong it has discharged its liability and made full restitution. It

is difficult, if not impossible, to conceive of any category of power to which the creation of a cause of action in favor of a person, to whom defendant has breached no positive duty imposed either by statute or common law, may be referred. Yet that is precisely the effect of the provision under review.

Clearly, if the legislature should provide that, in addition to making full restitution in a wrongful death action, the party at fault should reimburse any insurance company for all payments made by it on account of such death under policies written by it, it would scarcely be contended that such a law would be valid. Yet there is no distinction in principle between these two cases.

Conceivably a state, in the exercise of its power to establish offenses and prescribe punishment therefor, could declare any person wrongfully causing the death of another to be guilty of a misdemeanor and subject to fine, to be paid to the state, in addition to being responsible civilly to the deceased's next-of-kin. This, however, is not such a statute, nor is it conceivable that the legislature could create such a penalty to accrue to a complete stranger, against whom the wrongdoer committed no breach of duty.

It is said that the statute may be sustained as the creation of a cause of action for damages suffered by the insurance company by reason of the death of the deceased through the negligence of the appellant. In support of this suggestion the Court of Appeals cites *Pizitz Company* v. *Yeldell,* 274 U. S. 112, in which a statute permitting the recovery of punitive damages in a death action was sustained. In that, as in other similar cases, the punitive damages, like the compensatory damages recoverable, are recoverable by the personal repre-

sentative of the deceased, not by a stranger. Furthermore in the instant case, as pointed out in the dissenting opinion, the payments required to be made into the special funds created by subsections 8 and 9 of § 15 are in no true sense damages. In respect of this Judge Lehman said:

> "The liability of the employer to make payments to such a fund is not in any true sense a damage flowing from the defendant's wrongful act. It is a payment in the nature of an industrial tax which the Legislature has imposed upon employers for the purpose of creating an industrial fund for the benefit of those who are part of the industry. * * * The question before us is not whether the Legislature may compel a wrongdoer to make good all damages caused by his wrongful act, but whether the Legislature may shift to the defendant the ultimate liability for the payment, in the nature of an industrial tax, imposed upon the employer." (R. 18).

It would appear to be obvious that these occupation taxes could not have been imposed upon the third party wrongdoer in the first instance. Whether, in lieu thereof, the State could have provided for the creation of special funds through the exaction of a penalty accruing to the state in all cases of wrongful death of a person entitled to the benefits of the Workmen's Compensation Law, it is unnecessary to consider. The provision under review is not of this nature, and such a provision, if valid, would obviously have to be sustained on some ground other than the levy of an occupation or industrial tax.

It would also appear to be clear that these payments, being exacted as an occupation or industrial tax (the

theory on which they were sustained by this Court), cannot consistently therewith be shifted by law to the third party wrongdoer as damages caused by him. No person may be said to suffer damage by reason of the payment of a lawful tax, whatever its nature, or upon whatever contingency its payment may be conditioned.

Nor, consistently with the theory upon which the validity of this tax has been sustained, may it be said that the employer or his insurance carrier suffered any *damage* by reason of the payment of such taxes levied as a component part of the New York Workmen's Compensation Law. By that Law reciprocal benefits are conferred both upon employers and employee. The former is relieved of his common law liability and in lieu thereof is required to make compensation in all cases whether at fault or not but in amounts less than his common law liability. The employee, on the other hand, while deprived of his common law rights, becomes entitled to receive compensation in cases where no common law liability existed.

As originally enacted, all compensation was to be paid directly by the immediate employer of the injured or deceased employee. As disclosed by *State Industrial Commission* v. *Newman,* 222 N. Y. 363 and *State Industrial Commission* v. *Edsall,* 222 N. Y. 651, and by the footnote in *Sheehan* v. *Shuler, supra* (374), the purpose of subsections 8 and 9 was to relieve such immediate employer from the burden of paying a portion of such compensation in certain exceptional cases in which it was thought unjust to him and prejudicial to the employee to impose such burden upon him alone. This was

accomplished by requiring the payment of such portion of the compensation accruing in such exceptional cases out of special funds to be created by occupation taxes levied upon the industry. Subsection 8 deals exclusively with cases where a partial disability, as, for example, the loss of a single hand, is followed by total disability caused by the loss of the other hand. Clearly the compensation to which an employee suffering such a total disability is justly entitled is more than twice that to which he is entitled for the loss of a single hand. Clearly also, a second employer, in whose employ the second hand was lost, is not responsible for the loss of more than a single hand and might not be justly called upon to assume the additional compensation arising out of the total disability. As pointed out in the cases and footnote cited, it was also found that the assumption of such liability by a second employer operated as a hindrance to the employment of persons who had already suffered a partial disability. It was to relieve these situations that subsection 8 was passed. Subsection 9 had for its purpose a similar object, namely, the rehabilitation of injured employees and the payment of additional compensation during the progress of such rehabilitation out of special funds similarly created, instead of as a charge against their immediate employers.

All employers benefited alike by being thus relieved of the making of such additional compensation in the contingencies stated. There could have been little question but that under *Mountain Timber Company* v. *Washington, supra,* these special funds could have been created by the levy of occupation taxes ratably upon all em-

ployers in the industry involved. The precise question involved *Sheehan Company* v. *Shuler, supra,* and *N. Y. State Rys.* v. *Shuler, supra,* was whether it was arbitrary and unreasonable to limit such occupation taxes to employers whose own employees die as the result of injuries sustained in the course of their employment and leave no surviving dependents and who thus escape being called upon to pay compensation. In answering this question this Court said:

> "The payments thus required are not unfair and unreasonable in amount. The aggregate for the two funds is one thousand dollars. This is much less than the maximum payment which may be required according to the scales in case the employee leaves survivors entitled to death benefits, and seems not to exceed, if it equals, the average amount of the payments required in such cases." (p. 378).

Thus it will be observed that the particular employers against whom such occupation taxes were levied, in addition to being the beneficiaries of the general scheme under which in common with all others they were relieved of the payment of all additional compensation to be paid under subsections 8 and 9, were those who, by reason of the absence of surviving dependents, had escaped the payment of any compensation growing out of the death of a person in their employ. It will also be observed that the Court found that the amount of such taxes did not exceed the average compensation which would have been otherwise payable and was much less than the maximum compensation for which such em-

ployers would otherwise have been liable. The inference is plain that if the payments exacted had exceeded such compensation they would have been held to be arbitrary and unreasonable. But under § 29 they are sought to be shifted to persons who have been relieved of no existing liability and are required to pay them *in addition to making full restitution in the shape of compensatory damages.*

The liability imposed by subsections 8 and 9, like all other liabilities imposed by the Workmen's Compensation Law, are imposed by reason of the existence of the status of employer and employee and as an exercise of the State's power to substitute for the liabilities of the common law the new liabilities imposed, to be made a charge on the industry susceptible of recoupment in the employer's price. The employer is no more damaged by being compelled to pay the occupation taxes levied by subsections 8 and 9 of § 15 than by the making of any other payment required by the Workmen's Compensation Law for which he would not be liable at common law. All payments made thereunder rest upon a common basis under a scheme of which he is a beneficiary, as well as one under which he assumes certain responsibilities, and he is no more damaged by being required under such scheme to make certain payments than by being required to make others.

As for the insurance company, its obligations grew out of its contract of insurance, under which, for a consideration, it insured the employer against all liability accruing under the Workmen's Compensation Law, including the payment of these occupation taxes. Its liability did not grow out of any wrongful act upon the

part of the appellant but out of such contract of insurance.

Finally, under the interpretation placed upon the statute by the state court, and as applied to the facts of this case, appellant's wrongful act was not even the proximate cause of the respondent's payments. Under such interpretation, these payments were required to be made not because the appellant negligently caused the death of the deceased but because the deceased's widow collected from the appellant a sum in excess of the compensation for which the insurance company would otherwise have been liable. If she had taken her full compensation, or if the amount recovered had been less than such compensation, the respondent would have been required to pay nothing into these special funds. Under the facts of this case, there is not only wanting the absence of any breach of duty to respondent, which is customarily, if not universally, the origin of legal damage, but an absence of proximate cause as well.

It is respectfully submitted that the provision under review is so arbitrary and unreasonable as to amount to a deprivation of property without due process of law and in effect transfers the property of one person to another by legislative fiat for the private use of the latter, to whom the former sustained no contractual relation and against whom it had committed no tort.

2. The provision under review violates the equal protection clause of the Fourteenth Amendment because the classification upon which it depends is arbitrary, capricious and without substantial basis.

While the legislature may resort to classification, such classification must "be reasonable"; it "must not

be arbitrary or capricious". All persons similarly situated must be treated alike and there must be "a substantial basis" for the classification adopted and the differentiation of persons created thereby. *Quaker City Cab Co.* v. *Commonwealth of Pennsylvania*, 277 U. S. 389; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Atchison, Topeka & Santa Fe Ry.* v. *Vosburg*, 238 U. S. 56; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558-561; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *Barbier* v. *Connolly*, 113 U. S. 27, 31.

As said in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis, supra*, wherein a statute permitting the recovery of attorney's fees against a certain class of litigants in a certain class of cases was held bad:

> "The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. *That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.*" (p. 155). (Italics ours).

And as said by Mr. Justice Brandeis in the dissenting opinion in *Quaker City Cab Co.* v. *Commonwealth of Pennsylvania, supra*:

> " * * * the classification must rest upon a difference which is real as distinguished from one which is seeming, specious, or fanciful, *so that all actually situated similarly will be treated alike.*" (p. 406). (Italics ours.)

As an attempted exercise of the power of the State to create an additional cause of action or impose an additional liability for wrongfully causing the death of another, the provision in question clearly offends the equal protection clause as thus interpreted. Such liability is not imposed upon all persons wrongfully causing the death of another but only upon those wrongfully causing the death of another protected by the Workmen's Compensation Law. It is not imposed upon all such persons, but only when the victim is acting within the scope of his employment. It is not imposed in all such cases. On its face, it applies only to cases where such victim leaves no surviving dependents. As interpreted by the state court, it applies also to cases where dependents survive but elect to pursue their statutory right of action against the wrongdoer. So construed, however, it does not apply to all such cases but only to those in which the amount recovered in judgment or settlement equals or exceeds the compensation to which such dependents would, but for such election, have been entitled to receive.

But the wrong committed by the persons upon whom the liability is imposed is no greater than that committed by other persons wrongfully causing the death of another whose liability is confined to making full restitution under the wrongful death statute. Nor is the classi-

fication based upon any difference in circumstances under which the act in respect of which the classification is made, viz., wrongfully causing the death of another, is committed, or upon any difference in degree of fault attaching thereto. The offense or wrong of a person causing the death of another not entitled to workmen's compensation is equally as great as that of one whose victim comes under the law. The decedent was run over by one of the appellant's trains while acting in the scope of his employment. If he had been killed either through the negligence of the defendant or of some other person, while not acting within the scope of his employment, the offense would have been equally great. Certainly the degree of the injury to society is in no sense mitigated by the lack of surviving dependents. On the contrary, if dependents survive, the burden which may be cast upon society for their support is even greater. And certainly the offense or wrong committed by one causing the death of another, whose dependents collect in suit or settlement a sum less than the full amount of compensation under the Workmen's Compensation Law, is equally as great as that of another, the dependents of whose victim accept in settlement a sum equal to or exceeding such compensation. Yet, as construed by the state court, the latter person is liable and the former not.

As previously stated, the state might conceivably provide that every person wrongfully causing the death of another should be guilty of a misdemeanor and subject to fine, or to the payment of a penalty to be used for the creation of some special fund to be administered by the state. Such a law would have its foundation either in the state's interest in preserving the lives of all of its

citizens, or as a deterrent to the causing of wrongful death. But the fine or penalty imposed could not be imposed only upon white men, to the exclusion of black men, or where the victim was a black man and not a white man. Neither could it be made dependent upon the occupation in which the person killed was engaged or upon the absence of surviving dependents (in which the injury to society would actually be less than that committed by a person causing the death of one leaving dependents) and certainly not upon the amount recovered by such surviving dependents in a wrongful death action, making a wrongdoer who paid to such dependents more than a certain sum liable, but relieving another wrongdoer who paid less. The classification is purely arbitrary. It bears no relation whatever to the act in respect of which the classification is made, namely, that of wrongfully causing the death of another. It would be clearly bad in a public act, having for its purpose the protection of society at large and must be equally bad in an act, whose purpose is purely private.

Furthermore, as stated by Mr. Justice Brandeis in his dissenting opinion in *Quaker City Cab Co.* v. *Commonwealth of Pennsylvania, supra*, "the object of the classification must be the accomplishment of a purpose or the promotion of a policy which is within the permissible function of the State," and the relation to such object must be direct and not "remote or negligible". The establishment of a system of workmen's compensation is within the permissible functions of the state. But, as has been shown, the imposition of this additional liability has no direct relation to the promotion of such an object, the carrying out of which is in no wise

affected, whether this provision be held good or bad. The prevention of the destruction of human life is within the permissible functions of the state. As said by Mr. Justice Stone in *Pizitz Co.* v. *Yeldell, supra,* the state may make homicide expensive by providing for the recovery of punitive as well as compensatory damages. Such is not the object of this statute, which is merely to indemnify the employer or the insurance company. The statute sustained in the *Yeldell* case would have been clearly bad, if the recovery of punitive damages had been conditioned upon a classification similar to that now under review, and certainly so, if it had been conditioned upon the amount of compensatory damages recovered from the wrongdoer, rendering such wrongdoer liable for punitive damages only if such compensatory damages exceeded a stated sum.

There is nothing in the suggestion of the Court of Appeals (R. 14) that, since the Legislature might, but did not, make the liability of the defendant greater by imposing an additional liability in all cases of wrongful death, the appellant may not question the provision under review upon the ground that it has been denied the equal protection of the laws thereby, citing *People* v. *Braunstein,* 248 N. Y. 308, and *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571. The *Braunstein* case was a case involving the validity of acts providing for the establishment of supplementary schools in school districts over a certain size and for the compulsory attendance of minors between designated ages, both obviously proper subjects for classification. The ruling of this Court in the *Jeffrey* case, relied upon by the court below, was a ruling that an employer could not, under the equal protection clause,

complain that the statute discriminated against certain classes of employees, but only of discrimination against himself as an employer and in favor of other employers. This is not such a case. The discrimination complained of is a discrimination against some persons, wrongfully causing the death of another, in favor of others without any rational basis for such discrimination. Appellant is not complaining of a discrimination against some persons so killed, or their surviving dependents, and in favor of others.

In *Gulf, Colorado & Santa Fe Ry.* v. *Ellis, supra,* this Court, speaking of the statute under review which classified debtors, said:

> " * * * before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other." (p. 157).

The ruling made in that case is equally applicable to an attempted classification of persons wrongfully causing the death of another. In that case the statute might have been valid, if the requirement that all debtors unsuccessfully resisting the payment of debts should be required to pay an attorney's fee to the successful plaintiff, the result of which would have been to extend the liability of the appellant in that case to cases not within the purview of the statute under review. This did not prevent such appellant from successfully invoking the

equal protection clause by reason of the absence of any reasonable basis for the classification created by the statute. So here.

It is respectfully submitted that the provision in question on its face violates the equal protection clause; and if not, that, as interpreted and applied by the court below, under which, where dependents survive, the cause of action created is conditioned (1) upon the pursuit of their statutory action against the wrongdoer and (2) upon the recovery in settlement or judgment of an amount exceeding compensation accruing under the Compensation Law itself, it is clearly bad.

Respectfully submitted,

FREDERICK H. WOOD,
Attorney for Appellant.

APPENDIX.

A. New York Workmen's Compensation Law.

(1) Subsections 8 and 9 of § 15 (Consol. Laws, Ch. 67, § 15; L. 1917, Ch. 705, § 3, as amended by L. 1922, Ch. 615, § 1; L. 1920, Ch. 760, § 1, as amended by L. 1926, Ch. 261, § 1), at the time of Perroth's death, read as follows:

§ 15. Schedule in case of disability. The following schedule of compensation is hereby established:

* * * * * * * *

"8. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars. The state treasurer shall

be the custodian of this special fund, and the commissioner shall direct the distribution thereof.

"9. Expenses for rehabilitating injured employees. An employee, who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the state department of education is being rendered fit, to engage in a remunerative occupation, shall receive additional compensation necessary for his rehabilitation, not more than ten dollars per week of which shall be expended for maintenance. Such expense and such of the administrative expenses of the state department of education as are properly assignable to the expense of rehabilitating employees entitled to compensation as a result of injuries under this chapter, shall be paid out of a special fund created in the following manner: The employer, or if insured, his insurance carrier, shall pay into the vocational rehabilitation fund for every case of injury causing death, in which there are no persons entitled to compensation, the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund. * * *"

(2) Section 29, as amended in 1922 (Consol. Laws, Ch. 67, § 29; amended by L. 1922, Ch. 615, § 1), reads (the matter added by the amendment, which is the provision under review, is in bold face type):

"§ 29. *Subrogation to remedies of employees.* If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, shall, before any suit or any award under

this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commissioner may by regulation prescribe. If such injured employee, or in case of death, his dependents, elect to take compensation under this chapter, the awarding of compensation shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. **In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased.** Such a cause of action assigned to the state may be prosecuted or compromised by the commissioner. A compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be made

only with the written approval of the commissioner, if the deficiency of compensation would be payable from the state insurance fund and otherwise, with the written approval of the person, association, corporation, or insurance carrier liable to pay the same. Wherever an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee entitled to compensation under this chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor, or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian, as the board may determine in each case."

B. New York Decedent Estate Law.

Section 130 (Consol. Laws, Ch. 13, § 130; L. 1920, Ch. 919, § 1) reads as follows:

"§ 130. *Action by executor or administrator for negligence or wrongful act or default causing death of decedent.* The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued.

Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin, do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit."

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Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 307.

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,

Appellant,

—against—

PHOENIX INDEMNITY CO.,

Appellee.

BRIEF FOR APPELLEE.

JEREMIAH F. CONNOR,
Attorney for Appellee.

THE COURT PRESS—Law Printers—47 West Street—Bowling Green 2820-1-4

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No. 307.

THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY,

Appellant,

—against—

PHOENIX INDEMNITY CO.,

Appellee.

BRIEF FOR APPELLEE.

The Opinions Below.

The opinion of the Court of Appeals of the State of New York in the case now before the Court is reported in 251 N. Y. 127, and is printed in the transcript of record here, pages 614. The Opinion of the Appellate Division of the Supreme Court of the State of New York is reported in 224 App. Div. 346, and is printed in the record, pages 21-24.

Statement.

The case was heard in the first instance by the Appellate Division of the Supreme Court, Second Judicial Department, upon an Agreed Statement of Facts, under

Sections 546, 548 of the Civil Practice Act, and resulted in a judgment in favor of the appellee and against the appellant with an opinion by Seeger, *J.*

This judgment was affirmed by the Court of Appeals with an opinion by Hubbs, *J.*, with two of the judges of the Court of Appeals dissenting with an opinion by Lehman, *J.*

The case involves the constitutionality of that part of Section 29 of the Workmen's Compensation Law of the State of New York (Consolidated Laws, Chapter 67, Section 29) as amended by Chapter 615 of the Laws of 1922, Section 1, under which the Legislature, in cases where an employee is killed through the negligence of another not in the same employ, gave to the employer or insurance carrier, a right of action to recover against such third party the sum of $1,000 paid to the Treasurer of the State of New York under subdivisions 8 and 9 of Section 15 of said New York State Workmen's Compensation Law, which right of action is, as stated in the amended Section 29, "in addition to any cause of action by the legal representatives of the deceased."

The provisions of the statute in question are set forth at length in the appendix to the brief for appellant.

Upon the trial appellant also contended that the award of $1,000 was improperly made under the facts in this case, but the Court of Appeals had held to the contrary in *Matter of State Treasurer* v. *West Side Trucking Co.*, 233 N. Y. 202; *Matter of State Treasurer* v. *Niagara Falls Power Co.*, 241 N. Y. 521, and *Matter of Chrystal* v. *United States Trucking Corporation*, 250 N. Y. 566, and as this point merely involves a construction of a state law, it is not presented here.

Agreed Facts.

On February 24th, 1927, one Joseph Peroth was in the employ of one Anderson, and the latter had complied with the provisions of the Workmen's Compensation Law of the State of New York by insuring himself with the appellee against liability for the payment of workmen's compensation to his employees, including Peroth.

Peroth, on February 24th, 1927, while in the regular course of his employment by Anderson, was struck by a train owned and operated by the appellant, receiving injuries which caused his death, such injuries resulting solely by reason of the negligence of the appellant.

Peroth left surviving a widow. An administratrix of the estate was appointed, and suit was brought against the appellant on behalf of the widow. This suit was settled and discontinued before trial, the appellant paying to the administratrix the sum of Fifteen thousand ($15,000) Dollars, and receiving a general release therefor.

The sum of Fifteen thousand ($15,000) Dollars received by the widow was in excess of the amount which the widow would have received by way of compensation or death benefits if claim had been made by her against Anderson, the employer, and the appellee, the insurance carrier, pursuant to the Workmen's Compensation Law.

Thereafter, and pursuant to subdivisions 8 and 9 of Section 15 of the Workmen's Compensation Law, an award of $1,000 was made to the State Treasurer of the State of New York against said Anderson, and against the appellee. Said award was paid by the appellee to the State Treasurer on December 27th, 1927. The appellee demanded repayment of this sum from the appellant, which demand was refused.

The Questions Presented.

The only questions presented on this appeal are whether Section 29 of the Workmen's Compensation Law, under such Agreed Facts, violates the due process and the equal protection clauses of the Fourteenth Amendment of the Federal Constitution.

ARGUMENT.

I.

The provision of the New York Workmen's Compensation Law under review does not violate the due process clause of the Fourteenth Amendment and is justified because the wrongful act of appellant resulted in the death of the employee and set in motion the liability to the State Treasurer, because it promotes the public welfare, and is a part of the plan and scope of the Workmen's Compensation Law.

Section 29 of the New York Workmen's Compensation Law covers those cases in which an employee is injured or killed by the negligence of another not in the same employ. In case of death the section gives the dependents the option of taking the benefits of the Workmen's Compensation Law or the option of a suit to recover damages against the third person through whose negligence the employee was killed. Where there is an election to take compensation the employer or the insurance carrier paying the same may recover against the wrongdoer, and the damages may exceed the amount paid to

the dependents under the Compensation Law (*Travelers Insurance Co.* v. *Padula Co.*, 224 N. Y. 397; *Matter of Zirpola* v. *Casselman, Inc.*, 237 N. Y. 367; *Travelers Insurance Co.* v. *Brass Goods Mfg. Co.*, 239 N. Y. 273). If the dependents elect to sue the wrongdoer and receive less than the benefits of the Compensation Law, they may recover the deficiency of compensation from the employer or the insurance carrier. The provisions of Section 29 outlined up to the present time were contained in the statute when the same was upheld by the Court of Appeals of the State of New York in *Matter of Jensen* v. *Southern Pacific Co.*, 215 N. Y. 514, and by this Court in *New York Central Railroad Co.* v. *White*, 243 U. S. 188.

Subdivisions 8 and 9 were later added to Section 15 of the Compensation Law, and the constitutionality of these subdivisions was passed upon and upheld by this Court in *Sheehan Co.* v. *Shuler*, 265 U. S. 371, and in *New York State Railways* v. *Shuler*, 265 U. S. 379. This, however, was before the amendment of Section 29 which is now in question, which amendment merely gives to the employer or insurance carrier the right to recover back from the wrongdoer the award made to the State Treasurer under such subdivisions of Section 15.

The whole scheme of Section 29 of the Compensation Law, including that of the amendment in question, is to require the wrongdoer to make full restitution for any compensation payments arising through his wrongful act. The Legislature has merely said in substance—"the wrongdoer must pay"—and as stated by Mr. Justice Hubbs in the Court below:

"The argument that the State cannot lawfully

> place that burden upon those who are directly and wrongfully responsible for it is not convincing" (R., 11).

One of appellant's main arguments in attempting to show that the law in question contravenes the due process clause of the Fourteenth Amendment seems to be based upon the contention that the recovery by the administratrix of the estate of the decedent under Section 130 of the Decedent Estate Law is in full restitution for the wrongful death of the employee Peroth. The argument seems to be that the Legislature, when it authorized the cause of action on behalf of next of kin for wrongful death, made a pronouncement that the recovery should be in full restitution, which is equivalent to saying that the Legislature has no power to change the law or increase the damages. There can be no basis in law for such contention because (1) the right to recover damages for wrongful death is created solely by act of the Legislature which has exclusive power to determine both the measure of damages and the beneficiaries, and (2) because no one has any vested right to have such law remain unchanged.

With reference to the creation of the cause of action, attention is respectfully called to the following from the opinion of this Court in the case of *New York Central Railroad Co.* v. *White, supra,* viz.:

> "It may be added by way of a reminder, that the entire matter of liability for death caused by wrongful act both within and without the relationship of employer and employee, is a modern statutory innovation, in which the states differ as to who may sue, for whose benefit, and the measure of damages" (243 U. S. at p. 200).

The same subject is aptly summarized in the decision of the Court of Appeals in *Travelers Insurance Co.* v. *Padula Co., supra,* in the following language:

> "A civil liability and the right to recover damages for wrongful act or neglect causing death are created solely by statute. At common law no civil action would lie for causing the death of a human being. Legislative enactment is the exclusive source and boundary of the liability and the remedy. It may create the cause of action, define the period of its existence, and the party by whom and the method in which it shall be enforced and prescribe the measure of damages and the beneficiaries" (224 N. Y. at p. 402).

Further answering the proposition that a recovery under Section 130 of the Decedent Estate Law is full restitution, attention is called to the *Arizona Employers' Liability Cases,* 250 U. S. 400, wherein it was pointed out by this Court that no vested right exists to have such laws remain unchanged, and that the establishment of the cause of action and the changes in the laws creating the same, is left to the several states.

Through the enactment of this provision into Section 29 of the Compensation Law, the State Legislature has merely created an additional cause of action to the extent of $1,000. It had the same right to enact this legislation, the same right to say that the State Insurance Fund, the employer, or the insurance carrier, may recover the amount awarded and paid to the State Treasurer, as it had to write into the statute the provisions of Section 130 of the Decedent Estate Law.

In *Matter of Jensen* v. *Southern Pacific Co.* (*supra*), the plan of the Workmen's Compensation Law is con-

cisely stated in the opinion per Miller, *J.* in the following language:

> "The scheme of the statute is essentially and fundamentally one by the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments" (215 N. Y. at p. 519).

This Court in the case of *New York Central Railroad Co.* v. *White, supra,* said that,

> "One of the grounds of its (the public's) concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime."

In *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, this Court further stated that

> "It hardly would be questioned that the State might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry, and homes or support for the widows and orphans of those killed."

Subsequently this Court, in *Sheehan Co.* v. *Shuler, supra,* in upholding subdivisions 8 and 9 of Section 15 of the Compensation Law, and answering the same argument which is advanced here, namely, that a stranger, is being called upon to pay $1,000 for the purposes therein described, made the following pronouncement:

> "We do not think that the due process clause of the Fourteenth Amendment requires that such

> additional compensation to injured employees of the specified classes, should be paid by their immediate employers, or prevents the legislature from providing for its payment out of general funds so created."

Surely, if employers generally may be required to contribute to the beneficial fund created by subdivisions 8 and 9 of Section 15 of the Compensation Law, there can be no offence against the due process clause of the Fourteenth Amendment by an act of the Legislature requiring those who wrongfully cause the employee's death to make restitution for such contributions.

At this point we call attention to the fact that in the dissenting opinion in the Court below, no case is cited to show that the law in question violates the due process clause of the Fourteenth Amendment, and the dearth of citations in the brief for appellant upon the same question is also significant. Many decisions in this Court, however, support the law in question. The case of *Sheehan Co.* v. *Shuler, supra,* is in point, and special reference is also made to the following cases:

In *Arizona Employers' Liability Cases* (*supra*), this Court had under consideration the constitutionality of the act of the Legislature of the State of Arizona, which in certain cases created new causes of action and authorized the recovery of unlimited damages and in which it was held that the law did not offend against the due process clause of the Federal Constitution.

In *Pizitz Dry Goods Company* v. *Yeldell,* 274 U. S. 112, a statute of the State of Alabama permitting the recovery of punitive damages against an employer in a case where death resulted through the negligence of an

employee, was held to be constitutional. In that case the Court said:

> "Lord Campbell's Act and its successors, establishing liability for wrongful death where none existed before, the various Workmen's Compensation Acts, imposing new types of liability, are familiar examples of the legislative creation of new rights and duties for the prevention of wrong or for satisfying social and economic needs. Their constitutionality may not be successfully challenged merely because a change in the common law is effected. As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only upon those at fault but upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be presented."

In the same case also this Court intimated that the burden of making compensation for wrongful death could be imposed upon the wrongdoer without regard to the relationship of employer and employee. It is stated in the opinion that the states "may impose on the business or enterprise in which such loss of life occurs the economic burden of the protective measure adopted" (274 U. S. at p. 116). Thus in the instant case, the New

York Legislature enacted a protective measure by setting up the funds provided by subdivisions 8 and 9 of Section 15 of the Compensation Law, and it follows that it might impose the economic burden involved on the business in which the loss of life occurs. It was the business of the appellant which caused the loss of life in this case, and upon such business the economic burden should rest.

The case of *Noble State Bank* v. *Haskell,* 219 U. S. 104, appears also to be decisive in principle. That was a case construing a law of the State of Oklahoma requiring every bank incorporated under the law of the state to pay an assessment as a guarantee fund to secure a repayment in full to depositors in the case of any other state bank which might become insolvent. Any bank, no matter how solvent, is compelled to contribute to a fund for the protection of depositors in every other bank, although there is no direct relation between such depositors and the contributing bank, nor do the contributing banks have any control over the management of the bank which might become insolvent. Nevertheless, the act was upheld as a proper exercise of the police power and in the public interest. We fail to see how the act in question, requiring as it does the one who has committed a wrong to contribute to these funds, can be said to be unconstitutional when it has been held that the public welfare is promoted by the insurance of bank depositors by the levy of an assessment based upon the average daily deposits of all banks within the state.

It is to be observed also that there is no taking of property under the law in question without the opportunity of a defense. In the case now under discussion the negligence of the appellant was conceded, but if a suit were brought the defendant would have available

every defense which it would have in a suit by the personal representative under Section 130 of the Decedent Estate Law; and in view of the fact that the defendant is not a party to the proceeding upon the award to the State Treasurer, it would not be bound by such decision, and would also have available every defense as to the validity of the award which the employer or insurance carrier could have pleaded when the award was made.

Appellee asserts with confidence that the law in question is supported by social, economic and legal justifications. The State has exclusive jurisdiction to determine what amount shall be paid for a wrongful death, and for whose benefit. The reimbursement of the appellee in this case, which happens to be an insurance carrier, is somewhat beside the question. The primary duty of paying compensation is upon the employer who, under Section 50 of the Compensation Law, may pay the compensation directly under certain conditions, or may give security for such payment through an insurance company. No question of duty is involved as between appellant and appellee except the duty imposed by the Legislature under which appellant is required to make good any outlay made necessary by its wrongful act. There is a duty also to the public and to the industry upon which the burden of compensation is thrown. Appellee also disputes with emphasis the suggestion that appellant is a stranger to the compensation proceeding. One who sets in motion a compensation proceeding by its negligence is far from a stranger to such a proceeding.

Appellee respectfully submits that the provision under review is not arbitrary and is not unreasonable, that there is no taking of property without due process of law, and that the provision is not in violation of the due process clause of the Fourteenth Amendment.

II.

The provision under review does not set up any classification founded upon an unjust basis and does not violate the equal protection clause of the Fourteenth Amendment.

The provisions of subdivision 8 of Section 15 of the Compensation Law creating a fund for the payment of compensation to certain employees who become totally disabled, and the provisions of subdivision 9 of the same section creating funds for the rehabilitation of disabled workmen require the payment of $500, under each subdivision, in every case where the death of an employee is due to an accidental injury, and where no award is made to any dependent. Such is the construction of these subdivisions as determined by the Court of Appeals.

It has also been the scheme of the Workmen's Compensation Law, from the time of its enactment, that if the death of the employee was caused by the wrongful act of another, such person or corporation should make payment for the wrongful act either by way of damages recovered by the next of kin, or by way of a recoupment to the employer or insurance carrier who pays the compensation.

It is conceded of course that the wrongdoer is not called upon to recoup the employer or insurance carrier in every case of wrongful death. There can be no award to the State Treasurer except where there are no dependents, or, where the dependents recover from the wrongdoer a sum in excess of the compensation benefits. Where, however, there are no dependents or where, like in the instant case, no award of compensation can be made, the sum of $1,000 is payable to the State Treasurer, and

under Section 29, the employer or insurance carrier, upon paying the award has a right of action against the person who by wrongful act occasioned the death of the employee.

The law is uniform in requiring that the wrongdoer shall make good the payment of any award of $1,000 which may be made to the State Treasurer.

While it is true that this additional liability for the wrongful taking of life does not apply to every case, it is equally true that damages for wrongful death, especially within the State of New York, has never been uniform. The measure of damages under Section 130 of the Decedent Estate Law is the *pecuniary loss* to the next of kin. This loss varies in accordance with the earnings of the decedent, his station in life, and particularly in relation to the surviving dependents. The cost of wrongfully taking human life is far more expensive when a widow and children are left dependent than in a case where the next of kin have received no support from the decedent. And as stated by this Court in *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, at page 577, in speaking of alleged violations of the equal protection clause of the Fourteenth Amendment,

> "That a law may work hardship and inequality is not enough."

The only inequality in the present case is the fact that the Legislature has not required the payment of $1,000 in every case, and certainly it cannot be said as a matter of law that any hardship is imposed upon an industry simply because it has been made liable for an additional $1,000 in certain cases of wrongful death.

As pointed out in the Court below, in the opinion per Hubbs, *J.*, citing *New York Central Railroad Co.* v. *White, supra,* "States having similar statutes differ as to who may sue, for whose benefit, and the measure of damages" (R., 12), and as also pointed out in the Court below in some states the statute imposes a penalty (R., 13).

We assert with confidence that the Legislature could have required the payment of One thousand ($1,000) Dollars for the purposes mentioned in subdivisions 8 and 9 of Section 15 *in every case of wrongful death* whether the employee be subject to the Compensation Law or not, and irrespective of any amount awarded to or recovered by dependents. Appellant says that the present law is unequal because it does less. This argument is fully answered in *People* v. *Brounstein,* 248 N. Y. 308. In that case the provision of the Education Law requiring attendance at continuation schools, which did not apply to all children alike, was attacked as unconstitutional for the very same reason as here advanced. The Court held that the legislation was not discriminatory, and the following from the opinion per Andrews, *J.*, might well be paraphrased and applied to the case now before the Court:

> "The Legislature might forbid all minors under 18 to engage in regular work during the hours of the school day. It might require them to spend those hours in study. *It may do less"* (248 N. Y., p. 312). (Italics ours.)

The case *Jeffrey Mfg. Co.* v. *Blagg, supra,* and the authorities therein cited are similar in principle. In the *Jeffrey* case, it was held that the Compensation Law of

Ohio, which had application only to shops with five or more employees, did not result in arbitrary and unreasonable classification.

In conclusion appellee respectfully submits that the following quoted from the prevailing opinion in the Court below, is a concise summary of the reasons for upholding the provision under review.

> "Subdivisions 8 and 9 of section 15 and section 29, construed together, and in connection with the other provisions of the Workmen's Compensation Law, are 'component parts of a single scheme' and constitute a valid constitutional statute. The wrongdoer is made responsible for his wrongful act, the statute promotes the public welfare, and lawfully imposes a penalty upon the wrongdoer. It is uniform, in that it gives a right of action against all who wrongfully cause the death of an employee specified in the statute" (R., 14).

III.

Appellee respectfully submits, therefore, that the provision under review does not violate any clause of the Fourteenth Amendment, and that the decision appealed from should be affirmed.

Respectfully submitted,

JEREMIAH F. CONNOR,
Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 307.—October Term, 1929.

The Staten Island Rapid Transit Railway Company, Appellant, *vs.* Phoenix Indemnity Company. } Appeal from the Supreme Court of the State of New York.

[March 17, 1930.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This case was submitted to the state court upon an agreed statement of facts, and presented the question of the validity of a provision of section twenty-nine of the Workmen's Compensation Law of New York under the due process and equal protection clauses of the Fourteenth Amendment.

Joseph Perroth, in the course of his employment by one Anderson, was killed through the negligence of the appellant, The Staten Island Rapid Transit Railway Company. Perroth left surviving him a dependent, his widow. The administratrix of Perroth brought an action against the appellant to recover damages caused by his death, and the claim was settled by the payment of an amount in excess of that which the dependent would have been entitled to receive under the Workmen's Compensation Law. In these circumstances, there being no right of recovery by the dependent of Perroth against his employer, subdivisions eight and nine of section fifteen of the Workmen's Compensation Law became applicable.[1]

[1]Subdivisions eight and nine of section fifteen, as they stood at the time of Perroth's death, were as follows:

§ 15. Schedule in Case of Disability. The following schedule of compensation is hereby established:

. . . . . .

"8. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid,

The scheme of these provisions was the creation of two special funds in the hands of the state treasurer, the one to be used in paying additional compensation to employees incurring permanent total disability after permanent partial disability; and the other, in the vocational education of employees so injured as to need rehabilitation. These special funds were to be maintained by payments by the insurance carrier, as defined in the act,[2] of five hundred dollars for each of the two funds in those cases of injury causing death where there were no persons entitled to compensation under the act, and the payments made out of these special funds for the benefit of employees of the described classes were to be over and above the compensation which the act required to be made by the respective employers of such employees.

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in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund, and the commissioner shall direct the distribution thereof.

"9. Expenses for rehabilitating injured employees. An employee, who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the state department of education is being rendered fit, to engage in a remunerative occupation, shall receive additional compensation necessary for his rehabilitation, not more than ten dollars per week of which shall be expended for maintenance. Such expense and such of the administrative expenses of the state department of education as are properly assignable to the expense of rehabilitating employees entitled to compensation as a result of injuries under this chapter, shall be paid out of a special fund created in the following manner: The employer, or if insured, his insurance carrier, shall pay into the vocational rehabilitation fund for every case of injury causing death, in which there are no persons entitled to compensation, the sum of five hundred dollars. The state treasurer shall be the custodian of this special fund. . . ."

[2]The definition is as follows: " 'Insurance carrier' shall include the state fund, stock corporations or mutual associations with which employers have insured, and employers permitted to pay compensation directly . . ."

In the present instance, the respondent, as the insurer of Perroth's employer, paid to the state treasurer the amount of two awards, of five hundred dollars each, made jointly against Perroth's employer and the respondent under subdivisions eight and nine of section fifteen. The respondent then brought this suit under section twenty-nine of the Workmen's Compensation Law to recover this amount from the appellant which had wrongfully caused the death. That section provides:

"In case of the payment of an award to the state treasurer in accordance with subdivisions eight and nine of section fifteen such payment shall operate to give to the employer or insurance carrier liable for the award a cause of action for the amount of such payment together with the reasonable funeral expenses and the expense of medical treatment which shall be in addition to any cause of action by the legal representatives of the deceased."

Two questions were submitted to the state court:

"First. Was the state treasurer entitled to the awards made in his favor and paid by the plaintiff?

"Second. If the first question is answered in the affirmative, is the plaintiff entitled to recover the amount of said awards from the defendant by reason of section twenty-nine of the Workmen's Compensation Law?"

The Appellate Division of the Supreme Court of the State answered both questions in the affirmative, and the judgment entered accordingly for the respondent was affirmed by the Court of Appeals. That court decided that the provision of section twenty-nine which was held to justify the recovery did not violate the Fourteenth Amendment as denying either due process of law or the equal protection of the laws.

The due process clause is invoked on the ground that there is no reasonable basis for the creation of a cause of action against the appellant, and that the statute arbitrarily takes the property of one person for the private use and benefit of another. It is recognized that the State may create new rights and duties and provide for their appropriate enforcement. Recovery for an injury causing death and employers' liability and workmen's compensation acts are familiar illustrations. But it is argued that the appellant committed no wrong against the respondent, and that for the wrong against the deceased and his widow the appellant has made full restitution. The fact of this restitution, however, is an inadequate

basis for the conclusion sought. It can not be said that in providing for the recovery of the loss sustained by the dependents or next of kin of a deceased, the State has exhausted its authority to provide redress for the wrong. The State may permit the recovery of punitive damages in an action by the representatives of the deceased in order to strike effectively at the evil to be prevented. *Pizitz v. Yeldell,* 274 U. S. 112, 116. The State might also, if it saw fit, provide for a recovery by the employer for the loss sustained by him by reason of the wrongful act. The wrong may also be regarded as one against the State itself, in depriving the State of the benefit of the life of one owing it allegiance. For this wrong the State might impose a penalty. This is not contested. And it is well settled that the mode in which penalties shall be enforced, and the disposition of the amounts collected are matters of legislative discretion. *Missouri Pacific Railway Company* v. *Humes,* 115 U. S. 512, 523.

But it is said that the legislature can not cause a liability to accrue to a stranger against whom the wrongdoer committed no breach of duty. If, however, the State might penalize the wrongdoer by requiring a payment to be made by him directly to the state treasury, there would seem to be no reason why the State can not compel the wrongdoer to indemnify the employer, and his insurance carrier, for payments properly required of them and made to the State where the liability for such payments has arisen by reason of the death caused by the wrongful act. The State in this instance could have imposed a penalty on the wrongdoer and turned the amount over to the employer or his insurer for their indemnity. It could accomplish the same purpose without circumlocution.

There is no question here as to the validity of the provisions for the creation of the special funds in the hands of the state treasurer, in order to provide additional compensation to employees in cases requiring special consideration, or as to the validity of the requirement of payment by employers and their insurance carriers in order to maintain such funds. The constitutionality of these statutory provisions has been sustained by this Court. *R. E. Sheehan Co.* v. *Shuler,* 265 U. S. 371; *New York State Railways* v. *Shuler,* 265 U. S. 379. These provisions were an appropriate part of the plan of the Workmen's Compensation Law. It was not considered that the due process clause was violated because the addi-

tional compensation, to be made in the described classes of cases, was not paid to the injured employees by their immediate employers or because payment was to be made out of public funds established for the purpose. *R. E. Sheehan Co.* v. *Shuler, supra.* Thus, the respondent is in no proper sense a stranger to the wrongful act of the appellant. The respondent under the law of the State insured the employer of the deceased, and, as insurer, was required by the statute to make the payments in question to the state treasury. As these payments became obligatory because of the death caused by appellant's wrongful act, the indemnification of the respondent was a natural and reasonable requirement in consequence of that act. In creating the cause of action in order to obtain this indemnification, there was no lack of due process of law, as there was none in the means afforded by the State for enforcing the liability. In the action to enforce it the appellant could, as the state court has held in the present case, "avail itself of any defense which it has or ever had. It has a right to establish, if it can, that there could have been no recovery in the negligence action which it settled, and may test the validity of the awards against the insurance carrier by any defense which the carrier could have interposed, as it was not a party to that proceeding and is not bound thereby".

Nor do we find any sufficient gound for the contention that the statutory provisions in question denied the equal protection of the laws. The classification is attacked as arbitrary because it is said to rest on the circumstance whether or not there are persons entitled to compensation under the statute in the particular case, and that this depends on the further circumstance whether there are dependents and, if there are, whether they recover at least as much as the compensation for which the act provides. But this is the classification with respect to the requirement of the payments by the employer or his insurer for the maintenance of the special funds. That can not be said to be an unreasonable classification, as it provides for those cases where there are no persons entitled to compensation under the act, and thus the immediate employer and his insurer are relieved of the obligation to pay compensation. And, in view of the decisions of this Court, above cited, the validity of subdivisions eight and nine of section fifteen of the statute, as construed by the state court, requiring the payments by the employer and the insured in this instance, have not been questioned.

So far as the provision of section twenty-nine is concerned, it operates uniformly against all wrongdoers in like circumstances, that is, whenever awards as required by subdivisions eight and nine of section fifteen have been made against the employer, or his insurer, and such awards have been paid to the state treasurer.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.